Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ALLISON DESMOND, et al., On Behalf of Themselves and All Others Similarly Situated,

Petitioners,

vs.

BANKAMERICA CORPORATION, JOSEPH HEMPEN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Anti-Injunction Act, 28 U.S.C. § 2283, forbids federal courts from enjoining state judicial proceedings except for three narrow exceptions, including when an injunction is "expressly authorized by Act of Congress." In *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977), this Court left the law governing the "expressly authorized" exception in doubt due to the lack of a majority opinion. The question presented is:

> Whether a federal anti-suit injunction barring a state-court securities action is "expressly authorized" by the lead-plaintiff selection provisions of the Private Securities Litigation Reform Act, 15 U.S.C. §§ 77z-1(a)(3)(B), 78u-4(a)(3)(B), when neither the federal statute nor its legislative history reveals any intent to restrict access to state courts, the state lawsuit does not itself violate federal law, and the only possible effect the state proceeding could have on federal interests is that a settlement might release the federal securities claims.

PARTIES

Petitioners Allison Desmond, et al., on behalf of themselves and all others similarly situated, are plaintiffs in the enjoined state-court action and were the appellants before the Court of Appeals for the Eighth Circuit. Respondents BankAmerica Corporation, et al., were the defendants-appellees before the Eighth Circuit. Respondents Joseph Hempen, et al., were the plaintiffs-appellees before the Eighth Circuit.

TABLE OF CONTENTS

		Page
I.	OPINIONS BELOW	1
II.	JURISDICTION	1
III.	RELEVANT STATUTORY PROVISIONS	1
IV.	STATEMENT OF THE CASE	2
	A. Factual Background	3
	B. Procedural History	3
	1. State Court	3
	2. District Court	4
	3. Court of Appeals	9
	a. Majority Opinion	9
	b. The Dissent	12
V.	REASONS FOR GRANTING THE PETITION	13
	A. Certiorari Is Warranted to Resolve the Uncertainty Produced by the Lack of a Majority Opinion in *Vendo*, Which the Eighth Circuit Erroneously Interpreted to Allow a Federal Injunction of a State Suit When in Fact an Injunction Is Not "Expressly Authorized" Under Any of the Three Opinions in *Vendo*	16
	B. Certiorari Is Warranted to Resolve Deep Divisions in the Circuits on the Law Governing the "Expressly Authorized" Exception	23
	C. Certiorari Is Warranted Because the Eighth Circuit's Opinion Conflicts with This Court's Decision in *Matsushita* that Settlement of a State Suit Must Be Given Full Faith and Credit in a Federal Court When the State Court Has Dual Jurisdiction	26
VI.	CONCLUSION	29

TABLE OF AUTHORITIES

Page

CASES

1975 Salaried Ret. Plan for Eligible Employees of Crucible, Inc. v. Nobers,
968 F.2d 401 (3d Cir. 1992) 23

Alden v. Maine,
527 U.S. 706 (1999) 22

Alexander v. Sandoval,
532 U.S. 275, 121 S. Ct. 1511 (2001) 22

Amalgamated Clothing Workers v. Richman Bros.,
348 U.S. 511 (1955) 13, 14, 21, 22

Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers,
398 U.S. 281 (1970) 11, 13, 14, 21

Bolingbrook v. Citizens Utils. Co.,
864 F.2d 481 (7th Cir. 1988) 23, 24

Casa Marie, Inc. v. Superior Court,
988 F.2d 252 (1st Cir. 1993) 24

Castillo v. Cameron County,
238 F.3d 339 (5th Cir. 2001) 3

Chick Kam Choo v. Exxon Corp.,
486 U.S. 140 (1988) 13, 14, 21, 22

Clean Air Coord. Comm. v. Roth-Adam Fuel Co.,
465 F.2d 323 (7th Cir. 1972) 24

Corr. Servs. Corp. v. Malesko,
___ U.S. ___, 122 S. Ct. 515 (2001) 28

Employers Res. Mgmt. Co. v. Shannon,
65 F.3d 1126 (4th Cir. 1995) 24

Fla. State Bd. of Admin. v. Green Tree Fin. Corp.,
270 F.3d 645 (8th Cir. 2001) 5

TABLE OF AUTHORITIES – Continued

Page

General Motors Corp. v. Buha,
623 F.2d 455 (6th Cir. 1980) 18, 24

Gilbert v. Burlington Indus., Inc.,
765 F.2d 320 (2d Cir. 1985) 18

Green v. City of Tucson,
255 F.3d 1086 (9th Cir. 2001) 27

Hickey v. Duffy,
827 F.2d 234 (7th Cir. 1987) 23, 24

Idaho v. Coeur d'Alene Tribe,
521 U.S. 261 (1997) 16

In re BankAmerica Corp. Securities Litigation,
95 F. Supp. 2d 1044 (E.D. Mo. 2000) 1

In re BankAmerica Corp. Securities Litigation,
263 F.3d 795 (8th Cir. 2001) 1

In re G.S.F. Corp.,
938 F.2d 1467 (1st Cir. 1991) 18

In re Glenn W. Turner Enters. Litig.,
521 F.2d 775 (3d Cir. 1975) 25

Int'l Controls Corp. v. Vesco,
490 F.2d 1334 (2d Cir. 1974) 25

J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.,
___ U.S. ___, 122 S. Ct. 593 (2001) 22, 27

Jennings v. Boenning & Co.,
482 F.2d 1128 (3d Cir. 1973) 25

Kurek v. Pleasure Driveway & Park Dist.,
574 F.2d 892 (7th Cir. 1978) 23

L.A. Mem'l Coliseum Comm'n v. Oakland,
717 F.2d 470 (9th Cir. 1983) 24

TABLE OF AUTHORITIES – Continued

Page

Matsushita Electric Industrial Co. v. Epstein,
516 U.S. 367 (1996) ..... *passim*

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 22

Mitchum v. Foster,
407 U.S. 225 (1972) ..... *passim*

Nichols v. United States,
511 U.S. 738 (1994) 24

Novak v. Kasaks,
216 F.3d 300 (2d Cir. 2000)..... 5

Pennsylvania v. Union Gas Co.,
491 U.S. 1 (1989) 24

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 28

Piambino v. Bailey,
610 F.2d 1306 (5th Cir. 1980).....24, 25

Seminole Tribe v. Florida,
517 U.S. 44 (1996) 24

Smith v. Lenches,
263 F.3d 972 (9th Cir. 2001)..... 25

Stockslager v. Carroll Elec. Coop. Corp.,
528 F.2d 949 (8th Cir. 1976).....18, 24

Sycuan Band of Mission Indians v. Roache,
788 F. Supp. 1498 (S.D. Cal. 1992)..... 23

Tex. Employers' Ins. Ass'n v. Jackson,
862 F.2d 491 (5th Cir. 1988)..... 24

United States Steel Corp. Plan v. Musisko,
885 F.2d 1170 (3d Cir. 1989)..... 23

Vendo Co. v. Lektro-Vend Corp.,
433 U.S. 623 (1977) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Wershba v. Apple Computer, Inc.,
91 Cal. App. 4th 224 (2001) 28

STATUTES AND RULES

15 U.S.C.

§ 26 18

§§ 77a-77z-3 4

§ 77p(b) 6

§ 77p(c) 6

§ 77p(d) 7

§ 77p(f) 7

§ 77z-1(a)(1) 11, 17

§ 77z-1(a)(3)(B) 1, 5

§ 77z-1(a)(3)(B)(iii) 5

§ 77z-1(a)(3)(B)(v) 5

§ 77z-1(b)(4) 9

§§ 78a-78mm 5

§ 78bb(f)(1) 6

§ 78bb(f)(2) 6

§ 78bb(f)(3) 7

§ 78bb(f)(5) 7

§ 78u-4(a)(1) 11, 17

§ 78u-4(a)(3)(B) 1, 5

§ 78u-4(a)(3)(B)(iii) 5

TABLE OF AUTHORITIES – Continued

Page

§ 78u-4(a)(3)(B)(v) 5

§ 78u-4(b)(3)(D) 9

§ 78u-4(e) 4

§ 1610 27

28 U.S.C.

§ 1254 1

§ 1367 5

§ 1738 26

§ 2283 ..... 1, 7, 13, 21, 22, 29

42 U.S.C.

§ 1983 ..... 16, 17, 18

§ 2000e-7 27

California Code of Civil Procedure

§ 618 4

California Corporations Code

§ 25400 4

§ 25500 4

Federal Rules of Civil Procedure

Rule 23 ..... 5, 25

Rule 48 4

Supreme Court Rules

Rule 13.1 1

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE HISTORY

Private Securities Litigation Reform Act
Pub. L. No. 104-67, 109 Stat. 737 (1995) 5

Securities Litigation Uniform Standards Act
Pub. L. No. 105-353, § 101(c), 112 Stat. 3227,
3233 (1998) 6, 7

I. OPINIONS BELOW

The district court's order enjoining petitioners' suit in a California state court is published as *In re BankAmerica Corp. Securities Litigation*, 95 F. Supp. 2d 1044 (E.D. Mo. 2000). App. 18-38. In a 2-1 decision published as *In re BankAmerica Corp. Securities Litigation*, 263 F.3d 795 (8th Cir. 2001), the Court of Appeals for the Eighth Circuit affirmed the anti-suit injunction issued by the district court. App. 1-17. By unpublished order, the Eighth Circuit denied petitioners' request for rehearing and suggestion for rehearing en banc. App. 39.

II. JURISDICTION

The Eighth Circuit filed its 2-1 panel opinion on August 24, 2001, and denied the petition for rehearing and suggestion for rehearing en banc on November 8, 2001, with Judge Bye voting to grant rehearing en banc. App. 1-17, 39. This Court has jurisdiction under 28 U.S.C. § 1254. *See* S. Ct. Rule 13.1.

III. RELEVANT STATUTORY PROVISIONS

The Anti-Injunction Act, 28 U.S.C. § 2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

In relevant part, the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. §§ 77z-1(a)(3)(B), 78u-4(a)(3)(B), provides:

(B) *Appointment of lead plaintiff*

(i) *In general*

> [T]he court . . . shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members. . . .
>
> * * *

(iii) *Rebuttable presumption*

(I) *In general*

> [T]he court shall adopt a presumption that the most adequate plaintiff . . . is the person or group of persons that . . . in the determination of the court, has the largest financial interest in the relief sought by the class; and . . . otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.
>
> * * *

(v) *Selection of lead counsel*

> The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.

IV. STATEMENT OF THE CASE

Petitioners are plaintiffs in a putative class action in the California state courts. As elaborated below, their state case was peremptorily halted by a broad anti-suit injunction issued by the district court and affirmed by a divided panel of the Court of Appeals for the Eighth Circuit. Although they are not parties to the federal

action, petitioners have standing to appeal because they are adversely affected by the injunction. *See, e.g., Castillo v. Cameron County*, 238 F.3d 339, 349-50 (5th Cir. 2001) (collecting circuit decisions to that effect).

A. Factual Background

In September 1998, shareholders of NationsBank Corporation and respondent BankAmerica Corporation approved a merger between the two entities, forming a new BankAmerica Corporation. App. 2, 19. The merger was consummated formally in October 1998, and stock in the new company issued under a prospectus filed with the Securities and Exchange Commission. App. 2, 19.

The prospectus, however, failed to disclose an improvident $372 million "loan" made by the old BankAmerica to a secretive hedge fund. App. 2, 19. Later in October, the new BankAmerica was forced to announce massive losses stemming from, among other things, the $372 million undisclosed "loan." App. 2, 19. Shares in the new company dropped sharply following this startling disclosure. App. 2.

B. Procedural History

1. State Court

Based on these events, investors filed some 30 class-action lawsuits in various courts against BankAmerica and some of its top officers and directors. App. 2-3. Several suits were filed in the California Superior Court for the County of San Francisco, the home of the old BankAmerica. App. 3, 21. Consolidated before a single judge, the Honorable William J. Cahill, and styled *Desmond v. BankAmerica Corp.* (No. 998629), these state

actions sought relief under California Corporations Code §§ 25400 and 25500. App. 3, 21. They asserted no federal causes of action.

The *Desmond* plaintiffs had good reasons to prefer the state forum. Perhaps most important to the forum-selection decision, California law held the prospect of substantially greater damages for the class. Although a 90-day "bounce back" provision limited the damages available under federal law, 15 U.S.C. § 78u-4(e), California law imposed no similar restriction. As a result, damages that might be recoverable in the federal action were estimated to be substantially below those recoverable in the state case. 8th Cir. App. 141-71. In contrast to California law, moreover, federal law has effectively abolished joint-and-several liability for securities-law violations, 15 U.S.C. § 78u-4(e), and requires unanimous jury verdicts in civil cases. *Compare* Fed. R. Civ. P. 48 *with* Cal. Civ. Proc. Code § 618 (civil plaintiff prevails on 9-3 jury verdict in California courts).

2. District Court

Concurrent with the state case, other class actions, brought on behalf of essentially the same shareholders, were pursued in federal court. App. 2-3. One of the federal suits was filed by petitioners simultaneously with their state suit. App. 3. The Judicial Panel on Multidistrict Litigation consolidated and transferred the federal cases to the United States District Court for the Eastern District of Missouri. App. 3.

The federal suits asserted claims under the Securities Act of 1933 ("Securities Act," 15 U.S.C. §§ 77a-77z-3) and the Securities Exchange Act of 1934 ("Exchange Act,"

15 U.S.C. §§ 78a-78mm).[1] The federal actions were governed by the PSLRA. Pub. L. No. 104-67, 109 Stat. 737 (1995). The PSLRA revamped a number of the procedures governing federal private securities class actions. Among its goals, the legislation aimed to establish uniform federal standards for pleading fraud with particularity and to curtail perceived abuses of the federal securities laws. *See, e.g., Novak v. Kasaks*, 216 F.3d 300, 306, 310 (2d Cir. 2000); *Fla. State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 654 (8th Cir. 2001).

As it relates to this case, the PSLRA created new procedures mandating the appointment of a "lead plaintiff" in federal – but not state – securities class actions. 15 U.S.C. §§ 77z-1(a)(3)(B), 78u-4(a)(3)(B). The PSLRA directs that the lead-plaintiff mantle presumptively goes to the applicant with the "largest financial interest in the relief sought by the class" and who "otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. §§ 77z-1(a)(3)(B)(iii), 78u-4(a)(3)(B)(iii). Selection as lead plaintiff is accompanied by the right, subject to court approval, to select counsel for the class and otherwise generally to monitor the federal litigation. 15 U.S.C. §§ 77z-1(a)(3)(B)(v), 78u-4(a)(3)(B)(v). But appointment as lead plaintiff does not affect the amount of recoverable damages or any other substantive rights under the Securities or Exchange Acts.

---

[1] Initially, no California claims were asserted in the federal action even though federal courts have supplemental jurisdiction over such claims. *See* 28 U.S.C. § 1367. Ironically, it was not until after the state case was enjoined that the federal plaintiffs moved to add the same California statutory claims previously asserted in *Desmond* to their federal complaint. (Appellee Bank's Br. 1 n.1)

As the statute required, the district court appointed several investors (the "federal plaintiffs" below and respondents in this Court) as lead plaintiff in the federal action. App. 3. After the lead-plaintiff selection, petitioners, who were represented by the same counsel in both forums, voluntarily dismissed their federal suit, over the other parties' objection, to focus on the *Desmond* state-court action. App. 3.

Dual litigation ensued in state and federal court for over a year until November 1999, when the federal plaintiffs moved for a federal anti-suit injunction to halt further proceedings in *Desmond*. App. 5. They argued that, despite the existence of dual jurisdiction, events in the state case, including a possible global settlement, undermined their control of the federal action. CR91:3-5.

In responding to the motion, the *Desmond* plaintiffs contended that the Anti-Injunction Act's exception for injunctions "expressly authorized by Act of Congress" did not apply because the PSLRA does not remotely imply any federal judicial power to restrict parallel state litigation. CR59:8-10.

The *Desmond* plaintiffs noted that Congress did not focus on state suits until three years after the PSLRA was enacted. In 1998, Congress enacted the Securities Litigation Uniform Standards Act ("SLUSA"). Pub. L. No. 105-353, 112 Stat. 3227 (1998). SLUSA preempts large-scale securities-fraud class actions under state law. 15 U.S.C. §§ 77p(b)-(c), 78bb(f)(1)-(2). Petitioners pointed out, however, that SLUSA did not bar the consolidated *Desmond* state suits because they were filed before its effective date, and SLUSA explicitly provides that it is not

retroactive. Pub. L. No. 105-353, § 101(c), 112 Stat. 3227, 3233 (1998).[2]

Although agreeing that SLUSA did not apply, the district court rejected the *Desmond* plaintiffs' other contentions and enjoined the state proceedings on the eve of state-court settlement discussions before a retired federal judge. App. 18-38. The court found a power to enjoin the state-court action in the PSLRA's lead-plaintiff provisions. It cited the test set forth by this Court in *Mitchum v. Foster*, 407 U.S. 225 (1972), that a federal anti-suit injunction is "expressly authorized" for purposes of 28 U.S.C. § 2283 when " 'an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.' " App. 26 (quoting *Mitchum*, 407 U.S. at 238). The district court believed that, under *Mitchum*, the procedural benefits flowing from appointment as lead plaintiff somehow "cannot be given [their] intended scope if competing state court plaintiffs, representing a significantly smaller number of shares, can institute premature settlement negotiations which threaten the orderly conduct of the federal case and which could result in release of the federal claims." App. 27.[3] Reversing the presumption against enjoining state

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[2] SLUSA does not foreclose all state relief. Even after SLUSA, state courts retain considerable jurisdiction to address securities fraud. Congress excluded from SLUSA's preemptive scope representative actions involving 50 or fewer class members, individual fraud suits, and derivative actions brought by a shareholder on behalf of the corporation. 15 U.S.C. §§ 77p(d), (f), 78bb(f)(3), (5).

[3] Citations, footnotes, and internal quotation marks are omitted throughout unless otherwise noted.

suits, the court, without explanation, shifted the burden of persuasion to the *Desmond* plaintiffs to show "that the PSLRA does not constitute an expressly authorized exception to the Anti-Injunction Act." App. 30.

The district court condemned the conduct of petitioners' counsel in pursuing the California action and denigrated the *Desmond* action as "a blatant attempt at forum shopping." App. 29. The court's conclusion that counsel for the *Desmond* plaintiffs acted improperly, however, was directly contradicted by California Superior Court Judge Cahill, who witnessed events in the state case firsthand. He found that counsel for the *Desmond* plaintiffs "have conducted themselves in a professional and ethical manner throughout this litigation in the California Superior Court." (Appellants' Reply Bf. 3) At a hearing on the record, Judge Cahill added: "Your law firm in this case has always acted professionally. I have no complaints about how you do things, and I have not had any of the experiences that I read about in Judge Nangle's order." (*Id.* 4)[4]

In a sweeping order, the district court enjoined not only further litigation of the state claims, but also barred Judge Cahill from certifying a class or allowing any settlement discussions. App. 35-38. Issued nearly two years ago and still in effect today, the injunction halted all proceedings in the California Superior Court.

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[4] The Eighth Circuit granted petitioners' request for judicial notice of Judge Cahill's findings. App. 15 n.4.

3. Court of Appeals

a. Majority Opinion

The *Desmond* plaintiffs appealed to the Court of Appeals for the Eighth Circuit. They renewed their argument that an injunction barring the state case was in no way authorized – much less "expressly authorized" – by the PSLRA because its text and legislative history do not reveal any intent to cut off shareholder access to state courts. (Appellants' Opening Bf. 19-24) The *Desmond* plaintiffs noted that in contrast to the PSLRA, which simply made a number of procedural changes in federal securities cases, SLUSA expressly barred large-scale, state securities class actions and even gave federal courts the power to enjoin state proceedings in limited situations. 15 U.S.C. §§ 77z-1(b)(4), 78u-4(b)(3)(D) ("a court may stay discovery proceedings in any private action in a State court"). But SLUSA, as noted, does not apply retroactively to the *Desmond* action, bolstering the conclusion that the PSLRA did not authorize the injunction.

The *Desmond* plaintiffs argued that the district court not only misapplied the *Mitchum* test, but also ran afoul of *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977). (Appellants' Opening Bf. 21) As discussed in detail below, *Vendo* was the last time this Court addressed the expressly authorized exception, but the decision left the law unclear due to the lack of a majority opinion. In the plurality opinion in *Vendo*, then-Justice Rehnquist reviewed *Mitchum*'s discussion of the expressly authorized exception and concluded that to fall within it, the statute "countenancing the federal injunction must necessarily interact with, or focus upon, a state judicial

proceeding," 433 U.S. at 640-41, which is certainly not true of the PSLRA.

The *Desmond* plaintiffs further observed that the district court's rationale for the injunction – a possible release of federal claims in *Desmond* – was inconsistent with *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996). App. 12. In *Matsushita*, this Court held that when a state court has dual jurisdiction over an area of law, such as securities fraud, a class-action settlement in the state court releasing exclusively federal claims must be given preclusive effect in a federal court. 516 U.S. at 380-85.

Although acknowledging that SLUSA did not apply, the Eighth Circuit affirmed the injunction in a 2-1 decision. App. 1-17. Essentially agreeing with the district court, the panel majority (Heaney, J., joined by Loken, J.) found the power to enjoin parallel state litigation in the PSLRA's lead-plaintiff provisions. The majority emphasized the abstract importance of the lead plaintiff's role under the PSLRA: "We think it plain that the lead-plaintiff provisions of the PSLRA create significant federal rights that previously did not exist. It can hardly be gainsaid that the right to steer litigation of this magnitude is an important privilege." App. 9-10. The Eighth Circuit declined to follow the *Vendo* plurality opinion, reasoning among other things that Justice Rehnquist's reading of *Mitchum* was a "more restrictive view of the expressly-authorized exception" that was not "shared by a majority of the Court." App. 9 n.3.

The *Desmond* plaintiffs also argued to the panel that under this Court's precedents, the federal plaintiffs were obliged to present any objections to a possible state settlement in the California courts before a federal injunction

could issue halting the state proceedings. App. 13-14. Rejecting this contention, the Eighth Circuit dismissed the availability of remedies for challenging a settlement under California law as an "amiable gesture." App. 14. The majority faulted the *Desmond* plaintiffs for "fail[ing] to explain how the federal plaintiffs could ensure that the state court would accord them the full scope of rights bound up in the PSLRA's lead-plaintiff provisions," App. 14, not noting that the PSLRA by its terms applies only in federal court. 15 U.S.C. §§ 77z-1(a)(1), 78u-4(a)(1).

As did the district court, the Eighth Circuit expressed disdain for the purportedly "tortuous path" of the state action. App. 15. Although the PSLRA did not prohibit defrauded BankAmerica shareholders from seeking relief in a state forum, the majority chided the *Desmond* plaintiffs for their "flight to state court." App. 10. Brushing aside *Matsushita* as "inapposite," the majority declared that "[t]he point of the district court's injunction is not to prevent the resolution of federal claims through a settlement in state court. Rather, the injunction ensures that the resolution of the federal claims proceeds in a manner that preserves the federal rights created by the PSLRA." App. 13.

The Eighth Circuit acknowledged this Court's decision in *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), requiring that state courts generally be allowed "to proceed in an orderly fashion to finally determine the controversy." *Id.* at 297. The majority nevertheless supported the injunction by asserting that the *Desmond* state-court action was "anything but orderly." App. 14-15. As noted above, the state judge in *Desmond* found no such disorder from his closer vantage point. The Eighth Circuit took judicial notice of Judge

Cahill's comments but gave no deference to his finding and disregarded the many litigation advantages to plaintiffs in the state action. App. 15 n.4.[5]

Finally, the Eighth Circuit touched on comity and federalism. Although recognizing that the letter of SLUSA expressly barred a retroactive injunction halting the *Desmond* action, the majority nevertheless concluded that the new statute's preemptive force could be applied retroactively. Without attempting to accommodate the concurrent state litigation, the majority inexplicably asserted that California's strong interest in "preventing fraudulent practices" had to "give way to the national policies behind SLUSA." App. 14.

b. The Dissent

Judge Bye dissented. He concluded that the PSLRA's lead-plaintiff provisions were simply "logistical" and did not authorize enjoining the state case. App. 16-17. "A lead plaintiff's opportunity to control litigation is shared by every civil plaintiff, and so it hardly seems unique." App. 16.

Judge Bye continued: "It appears unlikely that a lead plaintiff's right 'could be given its intended scope only by the stay of a state court proceeding,' when all plaintiffs [in the state case] possess a constitutional right to opt out of a coercive state court settlement." App. 16 (quoting *Mitchum*, 407 U.S. at 238). "More important," he wrote, "nothing in the legislative history of the PSLRA suggests that Congress sanctioned the injunction of state court securities actions. To the contrary, that history reveals

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[5] As noted above (p. 5 n.1), the federal plaintiffs ultimately acknowledged these advantages by seeking to add the California claims to the federal complaint.

that Congress countenanced their continued availability." App. 16-17. Judge Bye concluded that "the propriety of an injunction in these circumstances is debatable among reasonable jurists," and that the California courts, therefore, should be allowed " 'to proceed in an orderly fashion to finally determine the controversy.' " App. 17 (quoting *Atlantic Coast*, 398 U.S. at 297).

The *Desmond* plaintiffs timely sought rehearing and suggested rehearing en banc. Their petition was denied on November 8, 2001, with Judge Bye voting to grant rehearing en banc. App. 39.

V. REASONS FOR GRANTING THE PETITION

A bedrock of federal law since 1793, the Anti-Injunction Act, 28 U.S.C. § 2283, is a congressional mandate to the federal courts to exercise restraint. As its name and text suggest, respect for the constitutional independence of state courts is at the statute's core. The Act "is a necessary concomitant of the Framers' decision to authorize, and Congress' decision to implement, a dual system of federal and state courts. It represents Congress' considered judgment as to how to balance the tensions inherent in such a system." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988).

Put more colloquially, federal courts have no license in this context to be adventurous. This Court has stressed that the Act "is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions," which are not to be "enlarged by loose statutory construction." *Atlantic Coast*, 398 U.S. at 286-87; *accord Chick Kam Choo*, 486 U.S. at 146; *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 514-16 (1955). Objections to rulings

affecting a federal right or interest must be presented to the state courts, which "are presumed competent to resolve federal issues." *Chick Kam Choo*, 486 U.S. at 149-50; *see also Atlantic Coast*, 398 U.S. at 287; *Amalgamated Clothing Workers*, 348 U.S. at 517-21. In short,"[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Atlantic Coast*, 398 U.S. at 297.

Although these interpretive tenets are well established, the Eighth Circuit failed to honor them. It instead adopted an overly expansive reading of the "expressly authorized" exception that disregards this historical understanding and improperly resolved all doubts against "permitting the state courts to proceed." The Eighth Circuit's overbroad application stems from the disparate views the Justices of this Court expressed in *Vendo* nearly 25 years ago. *Vendo* generated three opinions – a plurality, a concurrence, and a dissent – that each set forth a different test for applying the expressly authorized exception. As a direct consequence, the courts of appeals have come to different conclusions on the precise standard to apply. In this case, for example, the Eighth Circuit declined to follow the *Vendo* plurality opinion even though it has been followed by other courts. The lack of a single, coherent test has effectively blurred the "lines of demarcation" the Anti-Injunction Act is supposed to draw between federal and state judicial power. *Id.* at 286. Given the fundamental character of this statute and the myriad of circumstances in which its application is called into question, certiorari is warranted to clarify

the methodology the lower courts should use when determining whether a statute expressly authorizes a federal anti-suit injunction.

This is a compelling case in which to take up the expressly authorized exception because the *Desmond* injunction cannot be sustained under any of the three tests expressed by the Justices of this Court in *Vendo*. Indeed, the Eighth Circuit's decision – enjoining a state court to protect a procedure established solely for actions in the federal courts – is a sweeping holding for all future dual-jurisdiction civil actions, not just securities class actions. Various federal substantive statutory rights that are assertable in federal court are often accompanied by procedural elements, but it is quite a leap to halt a state proceeding in the name of protecting those procedural elements. What was done below either reads the word "expressly" out of the Anti-Injunction Act or effectively creates a fourth – "implicitly authorized" – exception to the Act nowhere sanctioned by its language. Either view of the Eighth Circuit's decision represents a dangerous expansion of federal judicial power that warrants this Court's review.

In a system of dual sovereigns, moreover, events in state courts often impact, and may even moot, related federal proceedings. Under this Court's decision in *Matsushita*, when a state court undisputedly has dual jurisdiction over the subject matter, the federal court's potential loss of adjudicatory authority because of a settlement in the state court is no basis for an injunction. Specifically, deference to state courts is warranted whenever "dual litigation" is "contemplated," including in antitrust, civil rights, employment, patent, and securities actions. *Matsushita*, 516 U.S. at 374-75, 380, 383-84.

Although paying lip service to "Our Federalism," the Eighth Circuit turned the Anti-Injunction Act's presumption of respect for state courts on its head, overlooking that a "doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 275 (1997).

A. Certiorari Is Warranted to Resolve the Uncertainty Produced by the Lack of a Majority Opinion in *Vendo*, Which the Eighth Circuit Erroneously Interpreted to Allow a Federal Injunction of a State Suit When in Fact an Injunction Is Not "Expressly Authorized" Under Any of the Three Opinions in *Vendo*

The three opinions in *Vendo*, discussed below, all interpreted the scope of *Mitchum*, the seminal case on the expressly authorized exception. The question in *Mitchum* was whether 42 U.S.C. § 1983 authorized enjoining a state court. 407 U.S. at 226. Answering in the affirmative, *Mitchum* comprehensively reviewed the Anti-Injunction Act's origins and case law. *Id.* at 231-35. In particular, this Court discussed six federal statutes that earlier decisions found had "expressly authorized" a federal anti-suit injunction. All six statutes were very explicit in either empowering a federal court to halt a state proceeding or directing the state court, under the command of federal law, to go no further. *Id.* at 234-35 & nn.12-17. From this case law, *Mitchum* extracted a two-part test for applying the expressly authorized exception – the federal statute must (1) create "a specific and uniquely federal right or remedy, enforceable in a federal court of equity," that (2) "could be given its intended scope only by the stay of a state court proceeding." *Id.* at 237-38.

Mitchum held that § 1983 was another statute in this select group because its legislative history revealed that "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial." *Id.* at 242. As this Court recognized, § 1983 was enacted in part because state courts had been used as instruments for violating federal constitutional rights: "Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." *Id.* at 240.

By divining a power to enjoin state courts from the PSLRA's lead-plaintiff provisions, the Eighth Circuit's decision in this case strays far beyond the "expressly authorized" underpinnings that the *Mitchum* court found in § 1983. Paramount is that the decision below completely departs from the statutory text. The PSLRA's "intended scope" is unmistakable. It applies only to a federal-court "private action arising under [the Securities or Exchange Acts] that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure." 15 U.S.C. §§ 77z-1(a)(1), 78u-4(a)(1). Of course, a state court cannot run afoul of rules confined to litigation in federal court – hence the utter absence of textual authority to enjoin the *Desmond* proceedings is apparent.[6]

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[6] The need for a textual nexus of some sort is underscored by the few circuit-level decisions since *Mitchum*, of which petitioners are aware, finding an injunction expressly

Unlike § 1983, moreover, the PSLRA's legislative history does not reveal any concern that state courts might be used to thwart the right to relief under the federal securities laws. The legislative debates do not suggest, even remotely, that federal courts can take the drastic step of enjoining state courts to protect procedural rights under the PSLRA. The attention of Congress was fixed entirely on the supervision of these cases in the federal courts.

That the Eighth Circuit has carved out a new exception to the general prohibition against federal anti-suit injunctions is fully illuminated by analyzing the three opinions in *Vendo*. The issue in *Vendo* was whether § 16 of the Clayton Act, 15 U.S.C. § 26, expressly authorized an injunction halting a state breach-of-contract action. 433 U.S. at 626-30. Five Justices of this Court held that the answer was no, but could not agree on a rationale.

Vendo produced three opinions that went in very different directions on how the *Mitchum* test should be applied. In a plurality opinion joined by two other Justices (including Justice Stewart, the author of *Mitchum*), then-Justice Rehnquist examined an issue not explicitly resolved in *Mitchum* – what is a "uniquely federal right or remedy?" He concluded that "[t]he private action for

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authorized by Act of Congress. *Cf. In re G.S.F. Corp.*, 938 F.2d 1467, 1474, 1477-78 (1st Cir. 1991) (statute authorized "any order, process, or judgment that is necessary or appropriate to carry [it] out"); *General Motors Corp. v. Buha*, 623 F.2d 455, 459 (6th Cir. 1980) (statute allowed court "to enjoin any act or practice which violates any provision of [this title]"); *Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320, 329 (2d Cir. 1985) (same); *Stockslager v. Carroll Elec. Coop. Corp.*, 528 F.2d 949, 952 (8th Cir. 1976) (statute authorized "all practicable means and measures" to achieve its goals).

damages conferred by the Clayton Act" was such a right. *Id.* at 632. Consistent with *Mitchum*'s focus on state-court violations of federal substantive rights as a prerequisite for an injunction, under Justice Rehnquist's analysis a "uniquely federal right or remedy" must carry a substantive character.

The *Vendo* plurality next addressed the second prong of the *Mitchum* test – the federal law can be "given its intended scope only by the stay of a state court proceeding." *Mitchum*, 407 U.S. at 238. Apparently finding "intended scope" insufficiently precise, Justice Rehnquist restated the second prong as follows: "[T]he Act countenancing the federal injunction must necessarily interact with, or focus upon, a state judicial proceeding." *Vendo*, 433 U.S. at 640-41. As he read *Mitchum*, if the statutory text reveals no intent to enjoin state courts, a federal antisuit injunction can issue only if "there exists sufficient evidence in the legislative history demonstrating that Congress recognized and intended the statute to authorize injunction of state-court proceedings." *Id.* at 631-33. Under Justice Rehnquist's analysis, § 16 of the Clayton Act did not satisfy *Mitchum*'s second prong because the statute itself did not focus on state courts: "It is not suggested that Congress was concerned with the possibility that state-court proceedings would be used to violate the Sherman or Clayton Acts." *Id.* at 634.

Justice Stevens' dissent, joined by three other Justices, advanced a sharply contrasting application of *Mitchum*. The opinion concluded that an injunction is expressly authorized under the Anti-Injunction Act when the state suit furthers the "precise conduct proscribed" by the federal statute in "direct violation" of that statute. *Id.* at 646-47 & n.3. Because the dissenters believed the state

litigation in *Vendo* itself was an instrument for violating the antitrust laws, the dissenters concluded that an injunction would be expressly authorized under *Mitchum*. *Id.* at 656-58.

In a concurrence, Justice Blackmun (joined by Chief Justice Burger) offered yet a third view of *Mitchum*. He essentially agreed with Justice Stevens' analysis, but concluded that the state suit could be enjoined only if it was "part of a pattern of baseless, repetitive claims" used to further a violation of federal law. *Id.* at 644. Under this view of *Mitchum*, a single illegal state suit is not enough.

The three *Vendo* opinions thus described dramatically distinct benchmarks – all claimed to be drawn from *Mitchum* – for applying the expressly authorized exception. The injunction in this case cannot be justified under any of the three *Vendo* approaches. Under the plurality's analysis, the injunction was improper both because the PSLRA's lead-plaintiff provisions established no federal substantive rights, and because their text and legislative history betray absolutely no focus on state courts. Under the dissent's analysis, no injunction was authorized because the *Desmond* action was not itself a violation of federal law. The federal plaintiffs retained control over the federal action at all times irrespective of events in the state case, which was brought to prosecute securities fraud under California law. Finally, under the *Vendo* concurrence, no injunction was warranted because the *Desmond* action was simply one case, not part of a pattern.

Indeed, this case provides a particularly appropriate record on which to resolve the uncertainty left by *Vendo*. The district court jettisoned comity and restraint, all but assuming control of the state case. Over a sensible dissent pointing out why no injunction was authorized, the

Eighth Circuit conjured an exception to § 2283 based on little more than its own intuition that the PSLRA's lead-plaintiff provisions are important enough that they somehow "expressly authorized" the halting of a state proceeding and a proscription of any discussions relating to its settlement. Yet "the importance of the federal policy to be 'protected' by the injunction is not the focus of the inquiry. Presumptively, all federal policies enacted into law by Congress are important, and there will undoubtedly arise particular situations in which a particular policy would be fostered by the granting of an injunction against a pending state-court action." *Vendo*, 433 U.S. at 636 (plurality). Such a loose application would leave the Anti-Injunction Act "completely eviscerated." *Id.*; *see also Chick Kam Choo*, 486 U.S. at 149; *Mitchum*, 407 U.S. at 229; *Atlantic Coast*, 398 U.S. at 286-87.

The Eighth Circuit's holding that the injunction was compelled by the "national policies behind SLUSA" also conflicts with settled Supreme Court doctrine. App. 14. As noted earlier, SLUSA now preempts most state-securities fraud class actions but, as the Eighth Circuit recognized, it does not apply retroactively to this case. Even if it did apply, a "federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings . . . invade an area preempted by federal law." *Atlantic Coast*, 398 U.S. at 294; *see also Chick Kam Choo*, 486 U.S. at 149; *Amalgamated Clothing Workers*, 348 U.S. at 515-17.

Rather than manufacture a hierarchy of importance nowhere reflected in § 2283, the Eighth Circuit's duty was to reconcile the PSLRA and the Anti-Injunction Act. This Court recently reiterated that "when two statutes are

capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, ___ U.S. ___, 122 S. Ct. 593, 605 (2001). That is easy to do in this case. By leaving the longstanding presumption against enjoining state courts intact, Congress necessarily found that the newly enacted policies underlying the PSLRA "must give way to the policies underlying § 2283." *Vendo*, 433 U.S. at 639 (plurality); *see also Chick Kam Choo*, 486 U.S. at 146. Despite the absence of explicit authority in the PSLRA, the Eighth Circuit disregarded this Court's mandate that the Anti-Injunction Act "is not to be whittled away by judicial improvisation" by finding implicit authority. *Amalgamated Clothing Workers*, 348 U.S. at 514; *see also Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 1520 (2001). Such an open-ended expansion of federal judicial power at the expense of state courts warrants this Court's review.

As discussed at the outset, larger principles are presented in this petition. State courts occupy a "special role . . . in the constitutional design." *Alden v. Maine*, 527 U.S. 706, 748 (1999). For our federal system to operate smoothly, they cannot lightly be prohibited from resolving disputes under state law involving their own citizens. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819). Undue interference with that core function "is an invasion of the authority of the State and, to that extent, a denial of its independence." *Alden*, 527 U.S. at 754; *see also Chick Kam Choo*, 486 U.S. at 146. The Eighth Circuit's opinion sustaining the injunction, without any textual basis or other evidence that Congress intended to cut off

access to a state forum, carries great potential for innocent and not-so-innocent intrusions on the independence and stature of state courts.

B. Certiorari Is Warranted to Resolve Deep Divisions in the Circuits on the Law Governing the "Expressly Authorized" Exception

The badly splintered decision in *Vendo* has spawned at least three lines of case law mirroring the varying approaches set forth in that decision. The result has been an incoherence in the law as to the proper test to apply that only this Court can end.

Some decisions have followed the analysis articulated by then-Justice Rehnquist, focusing on statutory text and legislative history as the touchstone for whether an injunction is "expressly authorized by Act of Congress." *See, e.g., United States Steel Corp. Plan v. Musisko*, 885 F.2d 1170, 1176-77 (3d Cir. 1989); *Sycuan Band of Mission Indians v. Roache*, 788 F. Supp. 1498, 1510-11 (S.D. Cal. 1992) (concluding that *Vendo* plurality opinion "narrowed the *Mitchum* test"). Others have preferred Justice Stevens' approach allowing a federal anti-suit injunction when the state case itself violates federal law. *See, e.g., 1975 Salaried Ret. Plan for Eligible Employees of Crucible, Inc. v. Nobers*, 968 F.2d 401, 409-10 (3d Cir. 1992); *Hickey v. Duffy*, 827 F.2d 234, 241 (7th Cir. 1987). Still others follow Justice Blackmun's requirement of repetitive litigation before an injunction can issue, bemoaning the lack of clarity in this area. *See, e.g., Bolingbrook v. Citizens Utils. Co.*, 864 F.2d 481, 482-83 (7th Cir. 1988) ("The Supreme Court has not brought light out of this darkness."); *Kurek v. Pleasure Driveway & Park Dist.*, 574 F.2d 892, 895-96 (7th Cir. 1978) ("Unfortunately, guidance for us in the present

situation is not as clear as it might be in view of the three-two-four division of the Court there."); *L.A. Mem'l Coliseum Comm'n v. Oakland*, 717 F.2d 470, 472 (9th Cir. 1983).

Some circuits even appear to blend the reasoning of the *Vendo* plurality and dissent. *See Piambino v. Bailey*, 610 F.2d 1306, 1332-33 (5th Cir. 1980); *General Motors Corp. v. Buha*, 623 F.2d 455, 458-59 (6th Cir. 1980); *Stockslager v. Carroll Elec. Coop. Corp.*, 528 F.2d 949, 951-53 (8th Cir. 1976). The uncertainty is such that one respected jurist followed Justice Stevens' approach in one case and then Justice Blackmun's approach in a different case one year later. *Compare Hickey*, 827 F.2d at 241, *with Bolingbrook*, 864 F.2d at 482-83 (Easterbrook, J.).

As this Court has observed: "This degree of confusion following a splintered decision . . . is itself a reason for reexamining that decision." *Nichols v. United States*, 511 U.S. 738, 746 (1994); *see also Seminole Tribe v. Florida*, 517 U.S. 44, 63-64 (1996) (revisiting "deeply fractured decision" in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

The need to clarify the methodology guiding the expressly authorized exception is heightened by disagreement among the circuits on the analytical approach required by *Mitchum* itself. Echoing the *Vendo* plurality, some circuits hold that the *Mitchum* test turns on the federal statute's text and legislative history. *See Casa Marie, Inc. v. Superior Court*, 988 F.2d 252, 261-62 (1st Cir. 1993); *Employers Res. Mgmt. Co. v. Shannon*, 65 F.3d 1126, 1131 (4th Cir. 1995); *Tex. Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 503 (5th Cir. 1988) (*en banc*); *Clean Air Coord. Comm. v. Roth-Adam Fuel Co.*, 465 F.2d 323, 325-26 (7th Cir. 1972). But another reads *Mitchum* as supporting an injunction when the state suit furthers a violation of

federal law – in substance following the *Vendo* dissent. *See Jennings v. Boenning & Co.*, 482 F.2d 1128, 1130 (3d Cir. 1973). These inconsistent views on what *Vendo* and *Mitchum* mean have been percolating for a long time and show no signs of self-correcting. Moreover, the plethora of cases that have grappled with these decisions demonstrate the recurring character of the problem.

Although the need to revisit *Vendo* and *Mitchum* alone warrants certiorari, the decision below compounds another circuit split that merits this Court's attention – whether the procedural aspects of a securities case support an anti-suit injunction. In contrast to the Eighth Circuit's interpretation of the PSLRA's lead-plaintiff provisions, two circuits in securities cases have rejected Federal Rule of Civil Procedure 23 as providing an expressly authorized exception. *See In re Glenn W. Turner Enters. Litig.*, 521 F.2d 775, 780-81 (3d Cir. 1975); *Piambino*, 610 F.2d at 1331-32; *see also Smith v. Lenches*, 263 F.3d 972, 975-76 (9th Cir. 2001) (loss of "procedural protections" afforded by PSLRA is not "legal prejudice" barring voluntary dismissal). Several circuits likewise hold that a state case cannot be enjoined under the Exchange Act unless the very prosecution of that case violates the federal securities laws. *See Int'l Controls Corp. v. Vesco*, 490 F.2d 1334, 1348-49 (2d Cir. 1974); *Jennings*, 482 F.2d at 1130; *Piambino*, 610 F.2d at 1332-33. The Eighth Circuit's expansion of federal injunctive power to protect procedural rights created by the PSLRA is at loggerheads with these decisions, providing yet another reason to grant certiorari.

C. Certiorari Is Warranted Because the Eighth Circuit's Opinion Conflicts with This Court's Decision in *Matsushita* that Settlement of a State Suit Must Be Given Full Faith and Credit in a Federal Court When the State Court Has Dual Jurisdiction

The linchpin for the injunction at issue was the district court's concern that it would lose the power to adjudicate the federal claims due to, in its words, a "premature" settlement in the California Superior Court releasing those claims. App. 27-28. As a basis for enjoining the *Desmond* action, this rationale conflicts with the letter and spirit of *Matsushita*, and is inconsistent with the respect a federal court is obliged to accord state courts.

The issue in *Matsushita* was whether a federal court can deny preclusive effect under the Full Faith and Credit Act, 28 U.S.C. § 1738, to a state-court judgment approving a class-action settlement because it releases federal claims that can be asserted only in federal court. 516 U.S. at 369. This Court answered with an emphatic no, reasoning that "even when exclusively federal claims are at stake, there is no universal right to litigate a federal claim in a federal district court." *Id.* at 385. In reaching that conclusion, *Matsushita* surveyed prior precedents dealing with several areas of law, including antitrust, civil rights, patent, and employment law. *Id.* at 374-75, 380, 384. This Court stressed that, as with these other subjects, "Congress plainly contemplated the possibility of dual litigation in state and federal courts relating to securities transactions." *Id.* at 383.[7]

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[7] Congress still does, although in much more limited circumstances after SLUSA, as discussed above (pp. 6-7 & n.2).

In this case, the district and circuit courts effectively concluded that *Matsushita* became a nullity in securities cases when the PSLRA was adopted. App. 12-13, 30 n.7. But just like the Exchange Act section examined in *Matsushita*, the PSLRA "does not prohibit state courts from approving the release of Exchange Act claims in the settlement of suits over which they have properly exercised jurisdiction." 516 U.S. at 381. Such settlements can be denied preclusive effect only if the PSLRA partially repealed the Full Faith and Credit Act. *Id.* at 380-81. It did no such thing. There is no express repeal and nothing approaching the "overwhelming evidence" required to establish an implied repeal. *J.E.M. Ag Supply*, 122 S. Ct. at 601 (citing *Matsushita*, 516 U.S. at 381).

Accordingly, even if a district court believed a "premature" settlement were afoot in a state case, under *Matsushita* it generally would have to honor that settlement. The Eighth Circuit's notion that the *Desmond* plaintiffs had "seize[d] control of the litigation of the federal claims" and that this somehow justified an anti-suit injunction cannot be reconciled with *Matsushita*. App. 13. Indeed, "the possibility of a race to judgment is inherent in a system of dual sovereigns." *Green v. City of Tucson*, 255 F.3d 1086, 1097 (9th Cir. 2001) (*en banc*).

The Eighth Circuit's approach, if allowed to stand, empowers a federal court to issue an anti-suit injunction any time it believes that a state-court settlement may occur, even when Congress has expressly provided that the state suit is permissible. This degree of self-protection is a sweeping notion and cannot be the law. Congress often directs that the existence of a federal remedy does not foreclose consistent state remedies. *See, e.g.*, 15 U.S.C. § 1610 (Truth in Lending Act); 42 U.S.C. § 2000e-7 (Title

VII). State courts' dual jurisdiction over many important areas of law is substantially diminished if a federal court can, as in this case, essentially short-circuit a proper state suit simply because it might lead to a settlement the federal court would have to honor.

Matsushita also reinforces the principle that state remedies must be pursued before the state suit can be enjoined. "If class-action plaintiffs wish to preserve absolutely their right to litigate exclusively federal claims in federal court, they should either opt out of the settlement class or object to the release of any exclusively federal claims." 516 U.S. at 385. This is precisely how the process is supposed to work – and would have worked in this case if a federal anti-suit injunction had not intervened. California law provides hospitable procedures for objecting to a class-action settlement. *See, e.g., Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 240, 253 (2001). Apart from state law, a class member's rights to be heard and to opt out are protected by the Fourteenth Amendment's due process provision. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). States are charged with "first line responsibility . . . for assuring that the constitutional essentials are met." *Matsushita*, 516 U.S. at 395-96 (Ginsburg, J., concurring and dissenting).

Contrary to the Eighth Circuit's conclusion, then, the availability of relief in the California courts was no mere "amiable gesture," but something a federal litigant wishing to object to proceedings in a state court must pursue. App. 14. This Court's recent decisions only confirm the importance of state-law remedies in ascertaining the scope of federal law. *See, e.g., Corr. Servs. Corp. v. Malesko*, ___ U.S. ___, 122 S. Ct. 515, 522-23 (2001) (declining to extend *Bivens* tort because plaintiff had other "effective

remedies," including relief under state law). The answer to the federal plaintiffs' purported conundrum was to present their concerns to the California Superior Court, not to halt the state case with the heavy hammer of a federal injunction. What happened below is totally inconsistent with bedrock principles of federalism and this Court's pronouncements in *Matsushita*. Certiorari should be granted so that this Court can reiterate that the respect for state courts embedded in § 2283 and *Matsushita* cannot be so lightly cast aside, as it was in this case and as it may be in the future.

VI. CONCLUSION

For the reasons given, this petition for a writ of certiorari should be granted.

DATED: January 18, 2002

Respectfully submitted,

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In re: BANKAMERICA CORPORATION SECURITIES LITIGATION,

Allison Desmond; Bruce O'Such; Dr. Herman Shyken; Mark Luniewski; Ted Kraftsow; Ernesto Gumapas; Signey Sorkin; Richard Levy; Lani Rothstein; Neil Koni, Appellants, Kevin Kloster; Joseph Hempen; John M. Kochler; David P. Oetting; Selma Kaiser; Brian Markee; Walter E. Ryan, Jr., Plaintiffs – Appellees,

v.

Hugh L. McColl, Jr.; James H. Hance, Jr.; David A. Coulter; Michael E. O'Neill; John J. Higgins; Marc D. Oken; Bank of America, Defendants – Appellees.

No. 00-2255.

United States Court of Appeals,
Eighth Circuit.

Submitted: Feb. 12, 2001.

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As Amended: Oct. 3, 2001.

Rehearing and Rehearing En Banc
Denied: Nov. 8, 2001.*

Arthur R. Miller, argued, Cambridge, MA (William S. Lerach, Leonard B. Simon, Eric A. Isaacson, Reed R. Kathrein, John K. Grant, Christopher P. Seefer, on the brief), for appellants.

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* Judge BYE would grant the petition. Judge MORRIS SHEPPARD ARNOLD took no part in the consideration or decision of this case.

Joe D. Jacobson, argued, Clayton, MO (Martin M. Green, Jonathan F. Andres, Warren R. Sern, Thomas C. Walsh, John Michael Clear, Jeffrey S. Russell, Arthur N. Abbey, Stephen T. Rodd, James S. Notis, Clinton A. Krislov, and Robert J. Stein, III, on the brief), for appellee.

Before LOKEN, HEANEY and BYE, Circuit Judges.

HEANEY, Circuit Judge.

Allison Desmond heads a putative class of plaintiffs in a California state-court securities fraud action. On April 25, 2000, the district court[1] presiding over a parallel federal class action granted an injunction that effectively halted the *Desmond* suit. Our task is to decide whether the injunction violates the Anti-Injunction Act, 28 U.S.C. § 2283 (2000). We conclude that it does not and affirm the district court.

I. BACKGROUND

In October 1998, BankAmerica Corporation merged with NationsBank Corporation to form a new BankAmerica Corporation. Shortly thereafter, it was disclosed that the new entity would take a $372 million charge-off for a bad loan to D.E. Shaw, a New York investment firm with which the old BankAmerica had established a relationship. The price of shares in the new BankAmerica dropped precipitously. *See In re BankAmerica Corp. Sec. Litig.*, 78 F.Supp.2d 976, 983-84 (E.D.Mo. 1999) (*BankAmerica I*). Between October 15 and November 18, 1998,

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[1] The Honorable John F. Nangle, Senior United States District Judge for the Eastern District of Missouri.

twenty-four class actions were filed in six federal district courts by stockholders of the predecessor companies. One of the federal cases was filed on behalf of appellant Lani Rothstein by the law firm of Milberg, Weiss, Hynes & Lerach ("Milberg Weiss"). The cases were consolidated by order of the Multidistrict Litigation Panel, and transferred to the Eastern District of Missouri. Milberg Weiss also filed five class actions related to the merger in California state court, including separate actions on behalf of Desmond and Rothstein.

After the district court appointed lead counsel according to the procedures set out in the Private Securities Litigation Reform Act of 1995 (PSLRA), Rothstein sought a voluntary dismissal from the federal action. Over the objection of other parties to the federal action, the district court granted Rothstein's motion on July 1, 1999. On July 6, 1999, the district court certified the remaining consolidated federal actions as a class action and certified four separate plaintiff classes.

Meanwhile, the five California class actions were consolidated as *Allison Desmond v. BankAmerica Corp.*, No. 998629 (Cal.Super. Ct.). The *Desmond* plaintiffs, through Milberg Weiss, first sought certification of a single class consisting of all those who acquired stock in BankAmerica or its predecessors between August 4, 1998, and October 13, 1998 ("the class period"). The motion proposed three class representatives, and proposed Milberg Weiss as class counsel. One of the proposed class representatives was subsequently stricken after it was learned that he was a convicted felon with a record of fraudulent conduct. The motion was denied due to conflicts among members of the proposed single class and because the

proposed lead plaintiffs, apparently having held stock in the old BankAmerica prior to the class period, were not truly representative of the whole proposed plaintiff class.

On November 17, 1999, the *Desmond* plaintiffs filed a second motion seeking certification of five proposed plaintiff classes: those who purchased NationsBank stock prior to the class period; those who purchased NationsBank stock during the class period; those who purchased old BankAmerica stock prior to the class period; those who purchased old BankAmerica stock during the class period; and those who purchased new BankAmerica stock after the consummation of the merger but before the disclosure of the Shaw charge-off. Just before a hearing on the second motion, however, defendants filed a notice of removal to federal court based on the Securities Litigation Uniform Standards Act (SLUSA), 15 U.S.C. §§ 77p, 78bb(f) (2000). The defendants contended that the addition of new class representatives amounted to a commencement of a new state-court securities law suit in violation of SLUSA, which had become effective on November 3, 1998.

The district court to which the *Desmond* case had been removed concluded that defendants' notice of removal was premature and remanded the case to state court. The court noted, however, that if parties or claims not identified in the original complaint were brought into the *Desmond* litigation by a class certification order, defendants would have 30 days to file a notice of removal under SLUSA.

Following the *Desmond* remand, Milberg Weiss attorney Reed Kathrein directed a letter to the California

Superior Court judge hearing the case. Kathrein indicated the Desmond plaintiffs "would like to resubmit a proposed order of class certification to this Court which would avoid adding new parties, yet resolve this Court's concerns with potential conflicts amongst the classes, and provide a mechanism to assure that each subclass is adequately represented and that the named plaintiffs and the Court are able to fulfill their fiduciary duties." (Br. Supp. Mot. Oral Arg., Ex. B, at 2.)

Following Kathrein's correspondence, a third motion for class certification was filed. Pursuant to a joint motion filed by the Desmond plaintiffs and BankAmerica, however, that motion was removed from the calendar to permit the parties to pursue a mediated settlement.

The federal plaintiffs filed their motion to enjoin the California actions in November 1999, contending that the California proceedings undermined the PSLRA's lead-plaintiff provisions. The district court granted a broad injunction on April 25, 2000, concluding that such an injunction was expressly authorized by the PSLRA and therefore permissible under the Anti-Injunction Act. *In re BankAmerica Corp. Sec. Litig.*, 95 F.Supp.2d 1044, 1049 (E.D.Mo.2000) (*BankAmerica II*).

The court concluded that PSLRA's lead-plaintiff provisions created new federal rights for certain plaintiffs in securities class-action lawsuits. Specifically, the court noted that the PSLRA, in response to abuses by professional plaintiffs and their attorneys, vested the control over such litigation in the plaintiff with the greatest financial stake, thereby eliminating the "race to the courthouse" system. The court further noted that the federal

plaintiffs represented more than twenty-six times the amount of stock represented by the *Desmond* plaintiffs, and that the *Desmond* plaintiffs had entered settlement negotiations after only "minimal written discovery and document exchanges" and before taking a single deposition. *BankAmerica II*, 95 F.Supp.2d at 1050.

Singling out Milberg Weiss, the court chastised the firm for engaging in "precisely the sort of lawyer-driven machinations the PSLRA was designed to prevent." *Id.* In the district court's view, the *Desmond* case was "nothing more than a thinly-veiled attempt to circumvent federal law." *Id.*

The district court concluded that the federal right of control by the greatest stakeholder could not "be given its intended scope if competing state court plaintiffs, representing a significantly smaller number of shares, [could] institute premature settlement negotiations which threaten the orderly conduct of the federal case and which could result in the release of the federal claims." *Id.* at 1049.

The court granted a broad injunction that (1) barred the named *Desmond* plaintiffs from prosecuting any class action claims arising out of the BankAmerica merger; (2) barred the California court from certifying any *Desmond* plaintiff classes; (3) barred the California court from ordering any alternative dispute resolution in *Desmond* and directed the court to stay any alternative dispute resolution that had already been ordered; (4) established procedures for the *Desmond* plaintiffs to opt out of any class certified by the federal court in order to pursue

individual actions. *Id.* at 1053-54. The *Desmond* plaintiffs now appeal the district court's issuance of the injunction.

II. DISCUSSION

The Anti-Injunction Act is part of a scheme, formed by statutory and decisional law, that serves to forestall the frictions that would result from turf wars between federal and state courts over control of a particular case. *See Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 286, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970). The Act bars a federal court from granting an injunction staying state-court proceedings unless such an injunction is (1) expressly provided for in a federal statute, (2) necessary in aid of the federal court's jurisdiction, or (3) necessary to protect or effectuate the federal court's judgments. 28 U.S.C. § 2283 (2000). We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1), and review de novo the district court's determination that § 2283 permits the *Desmond* injunction, *Prudential Ins. Co. v. Doe*, 140 F.3d 785, 788 (8th Cir.1998).

We begin by briefly describing the relevant legislative landscape. This case arose after the enactment of the PSLRA but prior to the enactment of SLUSA. With the PSLRA, which became effective on December 22, 1995, Congress sought to address abusive practices such as "strike suits"[2] by professional plaintiffs and their

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[2] A "strike suit" is defined as "[a] suit (esp. a derivative action) often based on no valid claim, brought either for nuisance value or as leverage to obtain a favorable or inflated settlement." *Black's Law Dictionary* 1448 (7th ed.1999).

attorneys by (1) entrusting lead plaintiff status to the plaintiff with the largest financial interest in the relief sought by the class, 15 U.S.C. §§ 77z-1(a)(3)(B), 78u-4(a)(3)(B); (2) requiring those seeking lead-plaintiff status to certify that they did not purchase the security at issue at the direction of counsel or in order to participate in a private securities lawsuit, 15 U.S.C. §§ 77z-1(a)(2)(A)(ii), 78u-4(a)(2)(A)(ii); (3) requiring court permission for those who seek to serve as lead plaintiff in a securities class action more than five times in any three-year period, 15 U.S.C. § 77z-1(a)(3)(B)(vi); and (4) granting lead plaintiff the right to select class counsel, subject to court approval, 15 U.S.C. § 77z-1(a)(3)(B)(v).

Plaintiffs' attorneys, however, were able to thwart the PSLRA's reforms by turning to state courts, thereby subjecting publicly traded corporations to an array of differing state-court practices. SLUSA, which became effective on November 3, 1998, took a more aggressive approach to the regulation of securities litigation by preempting state-law securities-fraud class actions with more than fifty plaintiffs. 15 U.S.C. §§ 77p(b), 77p(f)(2)(A), 78bb(f)(1). SLUSA also explicitly grants federal courts power to stay discovery in a private state-court action, 15 U.S.C. § 77z-1(4), and permits removal of state-court actions to federal court, 78 U.S.C. § 78bb(f)(2).

Because both the state-court and federal-court actions are *in personam* proceedings, the *Desmond* injunction does not fit within the Anti-Injunction Act's exception for injunctions in aid of the district court's jurisdiction. *See Kline v. Burke Constr. Co.*, 260 U.S. 226, 230, 43 S.Ct. 79, 67 L.Ed. 226 (1922). The exception for injunctions necessary to effectuate or protect the district court's judgments is

likewise inapplicable, because the district court's lead-plaintiff order is neither a final appealable order nor an order appealable under the collateral order doctrine. *Z-Seven Fund, Inc. v. Motorcar Parts & Accessories*, 231 F.3d 1215, 1218-19 (9th Cir.2000) (PSLRA lead-plaintiff order not appealable order); 17 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4226 (2d ed.1988) (exception for protection of judgments extends, at best, to interlocutory orders appealable under collateral order doctrine). We are thus concerned here with the "expressly-authorized" exception to the Anti-Injunction Act. This exception authorizes injunctions against state-court proceedings where the statute in question creates a federal right or remedy that can only be given its intended scope by such an injunction. *Mitchum v. Foster*, 407 U.S. 225, 238, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972).[3]

We think it plain that the lead-plaintiff provisions of the PSLRA create significant federal rights that previously did not exist. It can hardly be gainsaid that the

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[3] We acknowledge that Justice Rehnquist's plurality opinion in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977) suggests *Mitchum* might not mean what it says. Writing for himself and two additional justices, Justice Rehnquist stated that the Court has "clearly recognized that the Act countenancing the federal injunction must necessarily interact with, or focus upon, a state judicial proceeding." 433 U.S. at 640-41, 97 S.Ct. 2881 (per Justice Rehnquist with two justices concurring and one justice concurring in the result). Our reading of the concurring and dissenting opinions, however, fails to show that this more restrictive view of the expressly-authorized exception was shared by a majority of the Court.

right to steer litigation of this magnitude is an important privilege. The lead plaintiff's control over aspects of litigation such as discovery, choice of counsel, assertion of legal theories, retention of consultants and experts, and settlement negotiations gives the lead plaintiff decisional muscle that other members of the class lack. The very fact of the *Desmond* plaintiffs' flight to state court bespeaks the significance of this position.

Appellants attempt to minimize the import of the PSLRA lead-plaintiff provisions, categorizing the rights created therein as merely procedural. We are, however, unpersuaded that § 77z-1(a)(3)(B) is so insignificant, and find little meaning in the proposed distinction between procedural and substantive rights. Although § 77z-1(a)(3)(B) may be characterized as a mechanism for the selection of lead plaintiff, the consequences of that mechanism have great significance for plaintiffs in class-action securities litigation. It is therefore not quite accurate to characterize § 77z-1(a)(3)(B) as a mere extension of Federal Rule of Civil Procedure 23(a)(4) (class members may sue or be sued as representative parties only if they "fairly and adequately protect the interests of the class"). Moreover, one need only look to our opinion in *Stockslager v. Carroll Elec. Coop. Corp.*, 528 F.2d 949 (8th Cir.1976) to see that we have not been concerned with such artificial distinctions. In *Stockslager,* we found an injunction against state proceedings to be expressly authorized by the National Environmental Policy Act (NEPA), *id.* at 952, even though NEPA, like § 77z-1(a)(3)(B), reflects certain substantive policy judgments but is procedural in operation, *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 558, 98 S.Ct.

1197, 55 L.Ed.2d 460 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.").

Appellants also contend that construction of the PSLRA to authorize the sort of injunction ordered by the district court renders the amendments accomplished by the subsequent passage of SLUSA mere surplusage. We disagree. Initially, we are hesitant to interpret the PSLRA by looking to SLUSA, because "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 484-85, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997) (quoting *United States v. Price*, 361 U.S. 304, 313, 80 S.Ct. 326, 4 L.Ed.2d 334 (1960)). Further, there is a good reason why the injunctive power granted by SLUSA should be much narrower than the injunctive power the district court employed here; the inclusion of such injunctive power in SLUSA would be redundant. This is because SLUSA as a whole goes farther than authorizing injunctions against state-court class actions, it forbids the bulk of such actions from ever being filed:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –
>
> (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

§ 78bb(f)(1). Under SLUSA, therefore, *Desmond* would be preempted altogether, obviating the need for injunctive power of the sort invoked by the district court under the PSLRA. SLUSA's limited injunction power is instead aimed at plaintiffs who would use state-court actions to circumvent the automatic discovery stay that applies in federal actions upon the filing of a motion to dismiss, 15 U.S.C. § 77z-1(b)(1). *Compare In re Transcrypt Int'l Sec. Litig.*, 57 F.Supp.2d 836, 846-47 (D.Neb.1999) (concluding SLUSA injunction against state-court discovery applies only to state-court class actions, not individual actions) *with* A.C. Pritchard, *Constitutional Federalism, Individual Liberty, and the Securities Litigation Uniform Standards Act of 1998*, 78 Wash. U.L.Q. 435, 490 n. 267 (2000) (*Transcrypt* is "inconsistent with the text of the statute . . . and negates the primary purpose of the provision.").

Appellants also insist that the district court's injunction is nothing more than an impermissible effort to prevent a state-court settlement that would release federal claims, citing *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996) and *National Basketball Ass'n v. Minnesota Prof'l Basketball*, 56 F.3d 866 (8th Cir.1995) ("*NBA*"). In *Matsushita*, the Supreme Court held that the Full Faith and Credit Act, 28 U.S.C. § 1738, requires a federal court to give full preclusive effect to a state-court settlement judgment even though the claims settled include claims within the exclusive jurisdiction of the federal courts. In *NBA*, this court reversed a district court's injunction against a parallel state-court proceeding, concluding that the Anti-Injunction Act did not permit the district court to enjoin the

state proceeding merely to prevent the state court from pronouncing judgment first:

> Although the district court expressed concern that the state court might pronounce judgment first and the district court would have little, if anything, left to decide, this pessimistic forecast is a natural consequence of the nation's dual system of independent state and federal courts, and not a legal justification for staying state court proceedings.

56 F.3d at 872.

NBA and *Matsushita* are inapposite here. Neither stands for the proposition that a federal court must stand idly by while parallel state court proceedings are used to frustrate an important federal right, nor do they add anything to our Anti-Injunction Act analysis. The point of the district court's injunction is not to prevent the resolution of federal claims through a settlement in state court. Rather, the injunction ensures that the resolution of the federal claims proceeds in a manner that preserves the federal rights created by the PSLRA.

We agree with the district court that the rights created by § 77z-1(a)(3)(B) are meaningless if a state-court plaintiff who has won the race to the state courthouse may seize control of the litigation of the federal claims. Because an injunction against the California action was the only means available to the district court of giving those rights their intended scope, we believe the injunction was proper. The *Desmond* class disagrees, suggesting that instead of seeking the injunction against the California plaintiffs, the federal plaintiffs could have gone to the

state court, where they could have protected their interests in the settlement negotiations or even sought lead-plaintiff status. Although this might have been an amiable gesture, the flaw in this argument is appellants' failure to explain how the federal plaintiffs could ensure that the state court would accord them the full scope of rights bound up in the PSLRA's lead-plaintiff provisions.

Similarly unpersuasive are appellants' appeals to principles of equity, comity, and federalism. We recognize that the district court's injunction prevents the prosecution of a class action under California securities law, and in that sense prevents the vindication of the state's interests in preventing fraudulent practices. However, the significance of this aspect of the injunction wanes when one considers Congress's determination, albeit after the alleged fraud took place, that the state's interests must give way to the national policies behind SLUSA.

We also take issue with the appellants' suggestion that the injunction reflects an unjustified distrust of the California courts. Principles of federalism and comity require that federal courts, "anxious though [they] may be to vindicate and protect federal rights and federal interests, always endeavor[ ] to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). In the context of the Anti-Injunction Act, these principles demand that "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed *in an orderly fashion* to finally determine the controversy." *Atlantic Coast Line*, 398 U.S. at 297, 90 S.Ct. 1739 (emphasis added).

Yet it is precisely this concern for an orderly resolution of the federal claims that supports the issuance of an injunction here. In addition to determining that the PSLRA expressly authorized an injunction against the state proceedings, the district court concluded that, based upon the tortuous path the state court litigation had taken, the *Desmond* action was but an end run around the PSLRA. In short, the district court was convinced that the *Desmond* litigation was proceeding in a fashion that was anything but orderly and that would have subverted the PSLRA by putting small stakeholders in the driver's seat.[4]

Finally, we conclude that we lack jurisdiction to consider appellants' challenge to the sufficiency of the class notice approved by the district court. The class notice is neither interdependent with nor a part of the injunction, but is a separate issue entirely. Hence our jurisdiction, which flows from 28 U.S.C. § 1292(a)(1) (courts of appeals have jurisdiction over interlocutory appeals from district court orders granting injunctions), is limited to review of the injunction itself. *Surgidev Corp. v. Eye Tech., Inc.*, 828 F.2d 452, 457-58 (8th Cir.1987); *cf. In re Federal Skywalk Cases*, 680 F.2d 1175, 1179-80 (8th Cir.1982) (mandatory class certification order was essentially injunction against pending state-court actions and therefore appealable under § 1292(a)(1)).

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[4] Pursuant to appellants' request, we have taken judicial notice of the comments made by the California court on the record to the effect that counsel for the *Desmond* plaintiffs have conducted themselves professionally. These commendations do not, however, alter our analysis.

III. CONCLUSION

For the foregoing reasons, the district court's injunction concerning the *Desmond* action is affirmed.

BYE, Circuit Judge, concurring in part and dissenting in part.

The district court unearthed a federal right in various logistical provisions of the Private Securities Litigation Reform Act of 1995 (PSLRA) that enable "lead plaintiffs" to "control" securities litigation. I have my doubts that the PSLRA confers the sort of "uniquely federal right or remedy," *Mitchum v. Foster*, 407 U.S. 225, 237, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972), that authorizes a district court to enjoin state proceedings of equal dignity. A lead plaintiff's opportunity to control litigation is shared by every civil plaintiff, and so it hardly seems unique. Despite my doubts, however, I am reluctant to disagree with the district court because few cases explain what qualifies as a federal right, and the mode of discerning such rights is far from scientific.

The district court ultimately held that a lead plaintiff's right of control would be frustrated unless a dueling state securities action were enjoined. I disagree with the court's conclusion that an exception to the Anti-Injunction Act permitted an injunction here. It appears unlikely that a lead plaintiff's right "could be given its intended scope only by the stay of a state court proceeding," *id.* at 238, 92 S.Ct. 2151, when all plaintiffs possess a constitutional right to opt out of a coercive state court settlement. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). More important still

– and irrespective of whether opt-out rights prove illusory in practice – nothing in the legislative history of the PSLRA suggests that Congress sanctioned the injunction of state court securities actions. To the contrary, that history reveals that Congress countenanced their continued availability.

The majority's opinion reveals that the propriety of an injunction in these circumstances is debatable among reasonable jurists. Yet "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 297, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970). I respectfully dissent from the majority's disposition with the sole exception of its resolution of the class-notice issue.

In Re BANKAMERICA CORP. SECURITIES LITIGATION.

No. 1264.

United States District Court,
E.D. Missouri,
Eastern Division.

April 25, 2000.

John Michael Clear, Partner, Bryan Cave LLP, St. Louis, MO, Arthur N. Abbey, Mark C. Gardy, Lee Squitieri, Abbey and Gardy, New York City, William S. Lerach, Darren J. Robbins, Milberg and Weiss, San Diego, CA, Martin M. Green, Partner, Joe D. Jacobson, Green and Schaaf, St. Louis, MO, Warren R. Stern, Thad A. Davis, Marc Wolinsky, Wachtell and Lipton, New York City, Jules Brody, Aaron L. Brody, Tzivia Brody, Stull and Stull, New York City, Robert Abrams, Jeffrey G. Smith, Shane T. Rowley, Wolf and Haldenstein, New York City, Martin D. Chitwood, Christi C. Mobley, Chitwood and Harley, Atlanta, GA, Clinton A. Krislov, Krislov and Associates, Ltd., Chicago, IL, Vincent R. Cappucci, Andrew J. Entwistle, Entwistle and Cappucci, New York City, for BankAmerica Corporation.

ORDER

NANGLE, District Judge.

Before the Court is plaintiffs' motion for an injunction barring the prosecution of related state court class actions. For the reasons that follow, plaintiffs' motion is granted in part and denied in part.

I. BACKGROUND

This securities fraud case arises out of the September 30, 1998 merger between the former BankAmerica Corporation and the former NationsBank Corporation to form new BankAmerica. Plaintiffs allege that defendants violated the federal securities laws by failing to make certain material disclosures.[1] Between October 15, 1998 and November 18, 1998, twenty-four class actions were filed in six federal district courts against new BankAmerica and other defendants. Between October 19, 1998 and November 2, 1998, seven class actions were filed in California state court alleging claims against the same defendants for the same alleged misconduct.

One such federal action, *Rothstein v. BankAmerica*, No. 98-Civ-7547 (S.D.N.Y.), was filed simultaneously by Milberg Weiss Bershad Hynes & Lerach LLP with the five California class actions which are now consolidated as *Desmond*. When it became clear that the firm's clients lacked the financial stake to become lead plaintiffs in the federal case, and thereby select Milberg Weiss as lead counsel, Milberg Weiss dismissed the federal case to focus on the California cases where no financial stake rules govern the selection of lead plaintiffs and lead counsel.[2] The federal plaintiffs and defendants objected

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[1] For a more complete discussion of the facts underlying the case, see this Court's Order granting in part and denying in part defendants' motion to dismiss dated December 15, 1999 (Doc. 61).

[2] This type of attempt to avoid the requirements of the PSLRA was the impetus behind the Securities Litigation Uniform Standards Act, 15 U.S.C. §§ 77p(b)-(c), 78bb(f)(1)-(2).

to the dismissal on the grounds that the state proceedings would conflict with the federal proceedings at some indefinite point in the future. Finding no evidence of a current conflict, this Court allowed Milberg Weiss to dismiss its federal case. Order dated July 1, 1999. Developments since that date have revealed that the Court's trust that Milberg Weiss would cooperate with the federal plaintiffs and not attempt to create conflicts between the federal and state litigation was misplaced.

The federal actions were consolidated and transferred by the Judicial Panel on Multidistrict Litigation to this District. On April 9, 1999, the federal plaintiffs filed their first consolidated and amended class action complaint (Doc. 17). On April 20, 1999, the Court entered an Order appointing lead plaintiffs and lead counsel (Doc. 19). On May 3, 1999, the Court entered a case management Order directing the conduct of the federal proceedings (Doc. 25). On May 21, 1999, defendants filed a motion to dismiss (Doc. 27). On July 6, 1999, the Court

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Congress noted that after the passage of the PSLRA, plaintiffs' lawyers sought to circumvent the requirements of the PSLRA by filing securities suits in state courts in record numbers. Indeed, in California itself, securities class action filings increased roughly five-fold. H.R.Conf.Rep. No. 105-803, at 14-15 (1998). To stop such practices, the SLUSA bars securities suits filed in state court and requires that all such suits be removed to federal court. 15 U.S.C. §§ 77p(b)-(c), 78bb(f)(1)-(2). Nevertheless, the Act is not retroactive and does not apply to suits filed prior to November 3, 1998, the effective date of the Act. Pub.L. No. 105-353, § 101(c). Because the *Desmond* suits were filed prior to November 3, 1998, the SLUSA is not applicable to them as originally filed. *Desmond v. BankAmerica*, No. C-00-0169-VRW, at 5 (N.D.Cal. Feb. 23, 2000).

certified the class and appointed class representatives (Doc. 39). On July 19, 1999, the Court lifted the automatic stay of discovery in the federal case due in part to the existence of the California cases (Doc. 40). On December 15, 1999, the Court granted in part and denied in part defendants' motion to dismiss (Doc. 61). On March 9, 2000, the Court granted in part and denied in part the NationsBank plaintiffs' motion to amend complaint. Finally, on April 18, 2000, the Court approved plaintiffs' form of class notice and authorized plaintiffs to publish said notice to the class.

Five of the California state court actions were consolidated under the caption *Desmond v. BankAmerica Corporation,* which is pending before the Honorable William J. Cahill in the California Superior Court for the County of San Francisco. The remaining class actions, *Giorgetti v. BankAmerica Corporation,* purportedly consisting only of California plaintiffs raising California state law claims, were dismissed by the California Superior Court on November 30, 1999 and are presently on appeal. Decl. of Marie Seth Weiner, Ex. G.

No class has been certified in the *Desmond* case. The first motion for class certification requested that the state court certify a single class of all persons who purchased or otherwise acquired securities in new BankAmerica or its predecessors between August 4, 1998 and October 13, 1998, hereinafter referred to as the class period. *Desmond v. BankAmerica Corp.,* No. C-00-0169-VRW, at 2 (N.D.Cal. Feb. 23, 2000). Three individuals were proposed as class representatives, but one of those persons was struck by Milberg Weiss after it was revealed that he was a convicted felon with a history of fraudulent conduct.

Br.Supp.Mot. Injunction at 10-11. Milberg Weiss proposed itself as class counsel. This motion was denied on October 8, 1999 due to conflicts between stockholders in old BankAmerica and stockholders in NationsBank which required separate class counsel for each group of stockholders.[3] *Desmond v. BankAmerica*, No. C-00-0169-VRW, at 2; Decl. of Reid Kathrein, Ex. H. Interestingly, although the class purported to include individuals who purchased stock during the class period, the proposed class representatives were both holders of shares prior to the beginning of the class period. Consequently, the proposed class representatives were not truly representative of all members of the class. *Desmond v. BankAmerica Corp.*, No. C-00-0169-VRW, at 3.

A second motion for class certification was filed in the *Desmond* case on November 17, 1999. The motion requested certification for five proposed sub-classes: the NationsBank holder class – persons who purchased NationsBank stock prior to the class period; the NationsBank purchaser class – persons who purchased said stock within the class period; the BankAmerica holder class –

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[3] As this Court noted in its Order granting in part and denying in part defendant's motion to dismiss, the old BankAmerica shareholders cannot claim that failure to disclose the magnitude of the Shaw account and subsequent losses resulting therefrom injured them in any way. Rather, it caused their stock to be overvalued in the merger vis-a-vis NationsBank stock. Order dated Dec. 15, 1999, at 32. Consequently, at a minimum, there are differences in theories of recovery and damages between the classes of BankAmerica shareholders and NationsBank shareholders. These potential conflicts appear to be the basis for the state court's initial denial of the first motion for class certification.

persons who purchased BankAmerica stock prior to the class period; the BankAmerica purchaser class – persons who purchased said stock during the class period; and the new BankAmerica purchaser class – persons who purchased stock in the combined entity after the completion of the merger and before the disclosure of the Shaw information. Milberg Weiss proposed itself as class counsel for the NationsBank classes and the new BankAmerica class and Gold, Bennett and Cera as class counsel for the old BankAmerica classes. To address the lack of purchaser class representatives, five nonparty representatives were proposed to represent the purchaser classes. *Id.* at 3-4.

A hearing on this second motion for class certification was set for December 16, 1999. Just prior to the hearing, however, defendants filed a notice of removal on the basis of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. §§ 77p, 78bb(f), arguing that the addition of new class representatives amounted to the commencement of a new securities law suit in state court in violation of the SLUSA. The United States District Court for the Northern District of California, remanded the case to state court on February 23, 2000, holding that the notice of removal was premature. *Desmond v. BankAmerica*, No. C-00-0169-VRW, at 5. Nevertheless, Judge Walker indicated that "[i]n the event that parties or claims not stated in the original complaint are brought into this litigation by some mechanism other than amendment of the complaint, such as a class certification order, defendants would have 30 days in which to file a notice of removal under section 1446(b)." *Id.* at 7.

In response to the remand, Reed Kathrein of Milberg Weiss wrote a letter to California Superior Court Judge Cahill indicating the *Desmond* plaintiffs' intent to structure the classes to avoid removal of the case to federal court. He stated that "Plaintiffs would like to resubmit a proposed order of class certification to this Court which would avoid adding new parties, yet resolve this Court's concerns with potential conflicts amongst the classes, and provide a mechanism to assure that each subclass is adequately represented and that the named plaintiffs and the Court are able to fulfill their fiduciary duties." Br.Supp.Mot. Injunction, Ex. B, at 2 (letter from Reed Kathrein dated Feb. 24, 2000). Perhaps recognizing the difficulty of this task, given that only seven persons were named in the original complaint, a third motion for class certification was filed, but was "taken off calendar for 90 days" by agreement of the parties and Judge Cahill so that the case could be submitted to mediation. *Id.*, Ex. C (letter from Warren Stern dated April 4, 2000). Defendants have represented to the Court that mediation is set to begin April 27, 2000.

II. JURISDICTION

The *Desmond* plaintiffs' first objection to an injunction of the state court proceedings is that the Court has no jurisdiction to enjoin the California plaintiffs because they are not parties to the above captioned case. Citing only to a Ninth Circuit case decided in 1967, they assert

that the All Writs Act, 28 U.S.C. § 1651,[4] cannot be a basis for jurisdiction over absent class members. The *Desmond* plaintiffs' argument is specious. The Supreme Court has held that the power conferred under the All Writs Act "extends, under appropriate circumstances, *to persons who, though not parties to the original action* or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, . . . and encompasses even those who have not taken any affirmative action to hinder justice." *United States v. New York Tel. Co.*, 434 U.S. 159, 174, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977) (emphasis added). Accordingly, this Court clearly has jurisdiction to enjoin the prosecution of the California action, provided the requirements of the Anti-Injunction Act, 28 U.S.C. § 2283, are met.

III. ANTI-INJUNCTION ACT

A federal court may not enjoin state court proceedings unless one of the three exceptions of the Anti-Injunction Act applies. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 286-87, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970); *National Basketball Ass'n v. Minnesota Prof'l Basketball*, 56 F.3d 866, 871 (8th Cir.1995). The Anti-Injunction Act provides that "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress,

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[4] The All Writs Act provides that "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. In order for an Act of Congress to qualify under the "expressly authorized" exception, the statute need not contain an express reference to the Anti-Injunction Act itself. *Mitchum v. Foster*, 407 U.S. 225, 237, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972); *Kansas Pub. Employees Retirement Sys. v. Reimer & Koger Assocs., Inc.*, 77 F.3d 1063, 1069 (8th Cir.1996) (holding that even though the removal statute only commands stay of the case actually removed, it is also a basis for injunction of later-filed state court cases filed for the purpose of subverting removal jurisdiction). The test for determining whether the exception is satisfied is "whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." *Id.* at 238, 92 S.Ct. 2151.

The federal securities laws clearly create private rights of action at equity or at law to enforce liabilities or duties imposed under those statutes. 15 U.S.C. §§ 77v(a), 78r(a). In 1995, Congress passed the Private Securities Litigation Reform Act (PSLRA) to correct abusive practices in the prosecution of securities law class actions. H.R.Conf.Rep. No. 104-369, at 32-35 (1995). The passage of the PSLRA created new federal rights for certain plaintiffs in securities class action suits.

Prior to the passage of the PSLRA, the first plaintiff to file suit was typically selected to serve as class representative. *Id.* at 33. This "race to the courthouse" mentality resulted in class actions controlled not by real plaintiffs with a substantial interest in the case but by professional plaintiffs and their attorneys. *Id.* at 32-33. To

curb the use of strike suits by such plaintiffs and their attorneys, the PSLRA provides that the most adequate plaintiffs, those with the largest financial interest in the relief sought by the class, ***shall be*** appointed lead plaintiffs. 15 U.S.C. §§ 77z-1(a)(3)(B), 78u-4(a)(3)(B). Plaintiffs seeking to be lead plaintiff must certify that they did not purchase the security at the direction of counsel or in order to participate in any private action arising under the securities laws. 15 U.S.C. §§ 77z-1(a)(2)(A)(ii), 78u-4(a)(2)(A)(ii). Further, no person may serve as lead plaintiff in more than five securities class actions in any three-year period unless the court permits otherwise. 15 U.S.C. §§ 77z-1(a)(3)(B)(vi), 78u-4(a)(3)(B)(vi). Finally, the plaintiff selected as most adequate plaintiff has the right to select class counsel subject to the approval of the court. 15 U.S.C. §§ 77z-1(a)(3)(B)(v), 78u-4(a)(3)(B)(v).

Clearly, the PSLRA creates rights in plaintiffs possessing the greatest financial stake in the litigation. They have the right to be appointed lead plaintiffs, to control the course of the class action litigation, and to select class counsel of their choice. This federal right cannot be given its intended scope if competing state court plaintiffs, representing a significantly smaller number of shares, can institute premature settlement negotiations which threaten the orderly conduct of the federal case and which could result in the release of the federal claims.[5]

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[5] In *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 374, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996), the Supreme Court held that state courts could settle exclusively federal claims as part of a class action settlement of state law claims. Such a settlement would have preclusive effect on any pending federal court action.

In the instant case, the federal plaintiffs represent 2,583,505 shares of stock in new BankAmerica or its predecessors. The *Desmond* plaintiffs represent 98,678 shares.[6] The federal plaintiffs, representing over 26 times the amount of stock as the *Desmond* plaintiffs, clearly have a greater financial stake in the outcome of this litigation. Accordingly, they have a federal right, created by Congress in the PSLRA, to control the course of this litigation through counsel of their choice.

This right will be frustrated if this Court fails to enjoin the California proceeding. The California plaintiffs, with one-twenty-sixth the financial stake of the federal plaintiffs, have succeeded in having premature settlement negotiations ordered by the California court. They have not been certified as representatives of the class; in fact, they only represent seven individual persons at this time. No depositions, including depositions of high-ranking officials involved in the alleged fraud, have been taken. Further, only minimal written discovery and document exchanges have occurred at this time, yet the *Desmond* plaintiffs are in the position to begin negotiating a settlement of all class claims on behalf of all class members, including the federal plaintiffs herein.

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[6] 70,000 shares are represented by Gold, Bennett & Cera LLP, and 28,678 shares are represented by Milberg, Weiss. Reid Kathrein and Paul Bennett, attorneys for the *Desmond* plaintiffs, misrepresented to the Court that Milberg, Weiss (and its co-counsel) represented 95,678 and that Gold, Bennett & Cera represented an additional 70,000 shares. Kathrein subsequently admitted the error, and clarified that Milberg, Weiss represents only 28,678, exclusive of the shares represented by Gold, Bennett & Cera.

Additionally, Milberg Weiss's behavior in these cases are precisely the sort of lawyer-driven machinations the PSLRA was designed to prevent. Hindsight now reveals that the simultaneous filing of suits in state and federal court was a blatant attempt at forum shopping. When the federal forum proved unsavory because Milberg Weiss would not be able to control that case, the firm simply took its marbles and went to play in the state court. In that forum, they have filed numerous inadequate motions for class certification, overlooking potential conflicts of interest among classes and failing to propose class representatives which truly represent the entire class. Furthermore, one proposed class representative was highly inadequate due to his criminal record and history of participation in fraud. They have attempted to circumvent the prohibitions of the SLUSA by adding nonparty plaintiffs as class representatives, which would effectively create a new state securities law suit after the effective date of the SLUSA. When faced with the possibility that such an action would result in removal of the case to federal court, they indicated their intent to structure the classes, not in the best interests of the class members, but to avoid federal court at all costs. When that task proved difficult, they requested the state court to order mediation for settlement purposes, despite the fact that they do not represent the class and despite the fact that minimal discovery has been done either on the substantive issues or the damages available to class members. Clearly, the *Desmond* case is nothing more than a thinly-veiled attempt to circumvent federal law. The *Desmond* plaintiffs, and the law firm behind them, do not have the best interests of the class at heart and have

proved themselves wholly inadequate to control the conduct of this suit. The Court finds their attempts to do so outrageous. Accordingly, under the facts of this case, the Court finds that an injunction is necessary to preserve the federal plaintiffs' rights under the PSLRA.

The *Desmond* plaintiffs have failed to present any post-PSLRA support for their argument that the PSLRA does not constitute an expressly authorized exception to the Anti-Injunction Act.[7] While courts have consistently held, prior to the passage of the PSLRA, that concurrent securities litigation in state and federal court was contemplated by the federal securities laws, these courts do not address the fact that the PSLRA created specific and unique federal rights belonging to securities plaintiffs with the largest financial stake in the litigation. The *Desmond* plaintiffs utterly fail to address the legislative history, which indicates that the PSLRA was intended to bring about a wholesale change in the manner in which securities litigation was prosecuted in the federal courts. H.R.Conf.Rep. No. 104-369, at 32-35. While the PSLRA did not prevent the filing of securities litigation in state courts,[8] such preemption is not required for a court to

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[7] The only cited case decided after the passage of the PSLRA is *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 383, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996). This case does not address the PSLRA and instead discusses the state of securities law in 1993, at the time the suit was originally filed.

[8] Preemption of securities litigation filed in state court was accomplished in 1998 by the Securities Litigation Uniform Standards Act of 1998, Pub.L. No. 105-353, 112 Stat. 3227 (1998).

find that the Act of Congress expressly authorizes injunctions of state court proceedings. Indeed, *Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972), the case which provides the definitive test for the expressly authorized exception, involved a 42 U.S.C. § 1983 suit. Section 1983 suits may be brought in state court. *Maine v. Thiboutot*, 448 U.S. 1, 3 n. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980); *Martinez v. California*, 444 U.S. 277, 283-84 n. 7, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980).

Instead, the test for the expressly authorized exception is whether the federal right can be given its intended scope only by the stay of a state court proceeding. *Mitchum*, 407 U.S. at 238, 92 S.Ct. 2151. Certainly, this Court is reluctant to interfere with any state court proceedings. However, under the circumstances of this case, the Court finds that the right of the federal plaintiffs, who are without doubt the most adequate plaintiffs under the PSLRA, to control this case can only be given its intended scope if the *Desmond* proceeding is enjoined. Because the *Giorgetti* case is on appeal and is not a part of the pending settlement negotiations, the Court will decline to enjoin the prosecution of that case at this time.

IV. EIGHTH CIRCUIT PRECEDENT

The majority of Eighth Circuit precedent concerning the Anti-Injunction Act involves interpretation of the second and third exceptions to the Act. *See, e.g., National Basketball Ass'n v. Minnesota Prof'l Basketball*, 56 F.3d 866, 871 (8th Cir.1995) (interpreting the "to protect or effectuate its judgments" exception of 28 U.S.C. § 2283); *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1182-83 (8th Cir.1982)

(interpreting the "necessary in aid of its jurisdiction" exception). Although both *Skywalk* and *National Basketball Ass'n* contain language to the effect that the mere existence of a parallel state court proceeding does not justify an injunction,[9] the instant case presents more than the mere existence of a parallel state court proceeding. Here, there is a federal right expressly created by Congress which cannot be given its intended scope without the injunction of the state court proceedings. Under those circumstances, *Mitchum v. Foster*, 407 U.S. at 237-38, allows this Court to enjoin the state court proceedings pursuant to the first exception of the Anti-Injunction Act. Because the applicability of one exception is all that is needed to authorize an injunction under the Act, *Atlantic Coast Line R.R.*, 398 U.S. at 286-87, 90 S.Ct. 1739, *Skywalk* and *National Basketball Ass'n* are inapplicable to the Court's decision in this case.

V. *ROOKER-FELDMAN* DOCTRINE

The *Desmond* plaintiffs also argue that the *Rooker-Feldman* doctrine prohibits the entry of an injunction in

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[9] *National Basketball Ass'n*, 56 F.3d at 872 ("The mere fact that [the state court plaintiff] is pursuing a parallel state court lawsuit involving claims and parties common to the federal action does not justify the district court's intervention in state court proceedings."); *Skywalk*, 680 F.2d at 1182-83 ("The Supreme Court has narrowly interpreted the 'necessary in aid of jurisdiction' exception, and a pending state suit must truly interfere with the federal court's jurisdiction. As the objectors correctly point out, . . . a simultaneous in personam state action does not interfere with the jurisdiction of a federal court in a suit involving the same subject matter.").

this case. This doctrine provides that a federal district court does not have subject matter jurisdiction over challenges to state court decisions in judicial proceedings. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *Snider v. City of Excelsior Springs*, 154 F.3d 809, 811 (8th Cir.1998). "*Rooker-Feldman* precludes federal action if the relief requested in the federal action would effectively reverse the state court decision or void its holding." *Snider*, 154 F.3d at 811. Nevertheless, the doctrine "does not bar a federal claim brought by one who was not a party to the state court action and therefore not in any position to seek appellate review of the state court judgment." *Id.* at 812 (citing *Johnson v. De Grandy*, 512 U.S. 997, 1005-06, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994)).

The *Desmond* plaintiffs assert that granting the federal plaintiffs' motion for an injunction of the state court proceeding would violate *Rooker-Feldman* by overturning the state court's denial of a motion to stay the California cases made by the defendants and the denial of the state court plaintiffs' motion for class certification without prejudice.[10] Resp. Desmond Pls. to Mot. Injunction at 19; Declaration of Reed Kathrein, Exs. D & H. The federal plaintiffs are clearly not parties to the state court case. No

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[10] Plaintiffs imply that defendants argued before the state court that the motion for class certification should be denied with prejudice on the grounds that the state court plaintiffs were not suitable representatives for the class. Resp. Desmond Pl's to Mot. Injunction at 19.

class has ever been certified that might include the federal plaintiffs; hence, they were not in a position to seek appellate review of the denial of the motion to stay or the denial of the motion for class certification. *Snider,* 154 F.3d at 812 (holding that because state court had entered an order certifying a class of persons including the federal plaintiffs, said plaintiffs were subject to the *Rooker-Feldman* doctrine).

Furthermore, granting an injunction in this case would not effectively reverse the state court proceeding or void its holding. To determine whether the doctrine bars the federal plaintiffs' motion, the Court must determine what the state court held and whether the relief that the plaintiffs requested would void the state court's decision or would require the court to determine that that decision was wrong. *Snider,* 154 F.3d at 811. The state court held on February 5, 1999 that the defendants failed to demonstrate that a stay of the state court proceedings was required under the California Code of Civil Procedure 410.30(a) and 418.10(a). Decl. Reed Kathrein, Ex. D. This decision was made on the basis of facts before the California court on February 5, 1999 and on the basis of California law only. Granting the federal plaintiffs' motion for injunction would not void the state court's decision nor would it be a de facto determination that the state court was wrong in denying a stay on February 5, 1999. Because the entry of the injunction turns on the application of federal law to facts that have arisen after the state court's denial of the stay, the Court finds that the *Rooker-Feldman* doctrine is not implicated in the instant case.

The state court also held on October 8, 1999 that the state court plaintiffs' motion for class certification should be denied without prejudice on the basis of conflicts of interest between the various subclasses, Decl. Reed Kathrein, Ex. H. The Court is at a complete loss to see how granting the federal plaintiffs' motion for injunction would void the decision denying class certification. Although the *Desmond* plaintiffs imply that the state court order was a rejection of arguments made by the defendants concerning the propriety of class certification in the state court action, Resp. Desmond Pls. to Mot. Injunction at 19, the fact remains that the Superior Court did not certify a class at that time and, indeed, has yet to certify any class in the *Desmond* action. Accordingly, this Court's finding that the state court action interferes with the federal rights of the federal plaintiffs does not violate *Rooker-Feldman*.

VI. CONCLUSION

For the reasons set forth above,

IT IS HEREBY ORDERED that plaintiffs' motion for injunction barring the prosecution of related state court class actions is granted in part and denied in part.

IT IS FURTHER ORDERED that all named plaintiffs in the case styled *Allison Desmond et al. v. BankAmerica Corporation et al.*, Case No. 998629 (consolidated with case numbers 998652, 998659, 998701, and 998909) pending in the Superior Court of the State of California for the County of San Francisco, including but not limited to Allison Desmond, Bruce O'Such, Dr. Herman Shyken, Mark Luniewski, Ted Kraftsow, Ernesto Gumapas, and

Sidney Sorkin, and all persons, agents, representatives or employees acting in concert with them or on their behalf are hereby enjoined from prosecuting any claims arising out of or relating to (a) the September 30, 1998 merger between the former BankAmerica Corporation and the former NationsBank Corporation and (b) alleged non-disclosures or misrepresentations concerning the former BankAmerica Corporation's relationship with D.E. Shaw & Company and related entities, including but not limited to the claims asserted in the *Desmond* case, on behalf of one or more classes consisting of shareholders in new BankAmerica Corporation or any of its predecessors. Prosecution includes participation in mediation, arbitration, or any other alternative dispute resolution in the *Desmond* action, whether court-ordered or otherwise.

IT IS FURTHER ORDERED that the Superior Court of the State of California for the County of San Francisco is hereby enjoined from certifying any classes in the *Desmond* action consisting of shareholders in new BankAmerica Corporation or any of its predecessors in relation to any of the above-described claims.

IT IS FURTHER ORDERED that the Superior Court of the State of California for the County of San Francisco is hereby enjoined from ordering any mediation, arbitration, or other alternative dispute resolution in the *Desmond* action. The Superior Court is hereby ordered to stay any such alternative dispute resolution previously ordered by that court.

IT IS FURTHER ORDERED that the following opt-out procedures are adopted for the named plaintiffs in the *Desmond* action, as identified above:

1. For a period of thirty (30) days from the date of this Injunction, all *Desmond* plaintiffs may elect to opt out of the plaintiff classes presently certified by this Court. Any such plaintiff electing to opt out shall inform the Court of such election by filing a notice in writing with the Clerk of the Court within the 30-day period.

2. Any *Desmond* plaintiff who elects to opt out pursuant to the preceding paragraph shall be permitted to continue to prosecute his, her or its claims in the California Superior Court on an individual basis only, without representation of any purported class.

3. Any *Desmond* plaintiff who does not file a written notice of election to opt out within 30 days of the date of this Order will be deemed to have declined to opt out. The decision not to opt out within this period will be without prejudice to the *Desmond* plaintiff's right to opt out of the class at the time said right is offered to class members generally.

4. The decision of a *Desmond* plaintiff who elects to opt out during the 30-day period shall be final, and such plaintiff shall not be permitted to rejoin his, her or its class in the future.

IT IS FURTHER ORDERED that the Clerk of Court shall serve copies of this Order upon the law firms of Cotchett, Pitrie & Simon; Milberg Weiss Bershad Hynes & Lerach; and Gold, Bennett & Cera LLP; counsel for the state court plaintiffs, and upon the Superior Court of the State of California for the County of San Francisco. The counsel for the *Desmond* plaintiffs are hereby ordered to promptly provide copies of this Order to each client named as a plaintiff in that case.

IT IS FURTHER ORDERED that this injunction and restraint will continue in effect until further action or order of this Court or the entry of final judgment in all of the proceedings under MDL 1264.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-2255

In Re: BankAmerica Corporation Securities Litigation,	*	
	*	Order Denying
	*	Petition for Rehearing
- - - - - -	*	and for Rehearing En
Allison Desmond, et al.,	*	Banc
Appellants,	*	
	*	
vs.	*	
BankAmerica Corporation, et al.,	*	
	*	
Appellees.	*	

The petition for rehearing en banc is denied. Judge Bye would grant the petition. The petition for rehearing by the panel is also denied.

Judge Morris Sheppard Arnold took no part in the consideration or decision of this case.

(5128-010199)

November 8, 2001

Order Entered at the Direction of the Court: /s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

(2)

Supreme Court, U.S.
FILED
FEB 25 2002
CLERK

No. 01-1084

In The
Supreme Court of the United States

ALLISON DESMOND, *et al.*,
Petitioners,
vs.
BANKAMERICA CORPORATION,
JOSEPH HEMPEN, *et al.*,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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19 pp

QUESTIONS PRESENTED

Whether the provisions of the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. §§ 77z-1(a)(3)(B), 78u-4(a)(3)(B), stating that control of a securities class action shall vest in one or more lead plaintiffs, who shall presumptively be the member or members of the purported plaintiff class having the largest financial interest in the relief sought by the class, create a federal right in the lead plaintiffs to control the class action.

Whether the federal right created by the PSLRA of the lead plaintiffs to control a class action can be given its intended scope unless a federal court may enjoin a state court proceeding vesting control of the claims asserted in the class action in members of the purported plaintiff class having a lesser financial interest in the relief sought by the class, so that Congress, in enacting the PSLRA, "expressly authorized" federal courts to grant an injunction to stay proceedings in a State court, within the meaning of that phrase as used in the Anti-Injunction Act, 28 U.S.C. § 2283.

PARTIES

The petition does not individually list the petitioners other than Allison Desmond. Respondents assume that the other petitioners are the persons who were appellants in the Eighth Circuit. These persons are Neil Koni, Ted Kraftsow, Richard Levy, and Lani Rothstein, who along with Ms. Desmond were plaintiffs in the enjoined state-court action; and Ernesto Gumapas, Mark Luniewski, Bruce O'Such, Sidney Sorkin, and Dr. Herman Shyken, who were the non-plaintiffs proposed to serve as class representatives in the enjoined state-court action. *See infra* at 4-5.[1]

Respondents Joseph Hempen, Robert Hepworth, John M. Koehler, David P. Oetting, and Pamela Wootton, along with Earl J. Gates Sr., recently deceased, were the lead plaintiffs appointed to represent the NationsBank Classes in the district court. These respondents moved for the injunction that is the subject of the petition for certiorari, and were respondents before the Court of Appeals.

Respondents David Fike, Selma Kaiser, Brian Markee, Elizabeth Menkes, Walter E. Ryan, Jr., and Patricia A. Thomas were the lead plaintiffs appointed to represent the BankAmerica Classes in the district court. They were respondents before the Court of Appeals.

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[1] Ms. Desmond and Messrs. Koni and Kraftsow were originally proposed as class representatives in the state court action. Mr. Koni was withdrawn as a proposed class representative after defendants discovered his history of criminal convictions and civil fraud. (*See* App. 3, 21.)

Respondents Bank of America Corporation (the "Bank"), David A. Coulter, James H. Hance Jr., John J. Higgins, Hugh L. McColl Jr., Marc D. Oken, and Michael E. O'Neill were defendants in the district court. These respondents neither supported nor opposed the issuance of the injunction in the district court and took no position on the issue in the Court of Appeals.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

FACTUAL BACKGROUND 3

REASONS FOR DENYING THE PETITION 11

CONCLUSION 13

TABLE OF AUTHORITIES

Pages

Anti-Injunction Act, 28 U.S.C. § 2283 i

Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. §§ 77z-1(a)(3)(B), 78u-4(a)(3)(B) i

Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 112 Stat. 3227, 3233 (1998) .. 2, 5

In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.), 770 F.2d 328 (2nd Cir. 1985) 12

In re BankAmerica Corp. Securities Litigation, 78 F. Supp.2d 976 (E.D. Mo. 1999) 4, 8

In re BankAmerica Corp. Securities Litigation, 95 F. Supp.2d 1044 (E.D. Mo. 2000) ..... *passim*

In re BankAmerica Corp. Securities Litigation, 263 F.3d 795 (8th Cir. 2001) ..... *passim*

Bank of America to Settle Shareholder Suits, Wall Street Journal, Feb. 11, 2002 1

STATEMENT OF THE CASE

The petition for certiorari seeks review of an opinion of the Court of Appeals for the Eighth Circuit affirming the issuance of an injunction by the District Court for the Eastern District of Missouri of a state court action pending in the State of California.

On appeal to the Eighth Circuit, petitioners herein did not challenge any of the factual findings made by the district court. The relevant factual findings are stated in the decision of the district court, *In re BankAmerica Corp. Securities Litigation*, 95 F. Supp.2d 1044 (E.D. Mo. 2000), reproduced at pages 18–38 of the Appendix, and in the opinion of the Court of Appeals, *In re BankAmerica Corp. Securities Litigation*, 263 F.3d 795 (8th Cir. 2001), reproduced at pages 1–17 of the Appendix.

Two items should be noted as preliminary matters.

First, the case below has recently been settled, subject to final court approval, by the defendants' agreement to pay the plaintiff classes the sum of $490 million. *See Bank of America to Settle Shareholder Suits*, Wall Street Journal, Feb. 11, 2002, at A11. In exchange for this payment, the plaintiff classes have agreed to release defendants and all related persons from liability for any claim that had been or could have been asserted in the case, including all claims relating to the D. E. Shaw-related losses or arising out of the merger that formed the Bank.

This release, once effective, will release all of the claims asserted by petitioners on behalf of their putative classes in

the state court action, excepting only those claims asserted by or on behalf of the approximately 2200 persons who have opted out of the federal class action.

Second, the petition for certiorari asks this Court to resolve a legal issue that is unlikely to arise in future cases. On November 3, 1998, a few days after petitioners filed their state court actions, the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 112 Stat. 3227, 3233 (1998), became effective. SLUSA bars the filing in state court of securities class actions for classes comprised of more than 50 members, and requires any securities class actions improperly filed in state court be removed to federal district court.

Due to the enactment of SLUSA, the Eighth Circuit's decision will not likely apply to future cases because the circumstances that authorized the injunction approved by the Eighth Circuit arise only where competing state and federal securities class actions were filed during a brief period beginning on the effective date of the PSLRA, December 22, 1995, and ending on the effective date of SLUSA, November 3, 1998. (*See* App. 11-12.)

The settlement mooting the dispute, and the change in the law making the issue here unlikely to be repeated, both weigh against a grant of certiorari.

FACTUAL BACKGROUND

In October and November 1998, 24 lawsuits were filed in six federal district courts by shareholders of the Bank and its two predecessor entities, BankAmerica Corporation and NationsBank Corporation. BankAmerica and NationsBank merged September 30, 1998. The Multidistrict Litigation Panel ordered the cases consolidated and transferred to the Eastern District of Missouri, and appointed Senior United States District Judge John F. Nangle, chairman of the Multidistrict Litigation Panel, to preside over the consolidated cases. (App. 2-3).

One of the 24 federal cases was filed by Lani Rothstein, a petitioner herein. Ms. Rothstein's federal case was filed on her behalf, and on behalf of the classes the district court ultimately certified, by the law firm of Milberg Weiss Bershad Hynes & Lerach ("Milberg Weiss"). (App. 3).

Simultaneous with filing the federal *Rothstein* case, Milberg Weiss filed five parallel cases in California state court, including *Allison Desmond vs. BankAmerica Corporation* ("*Desmond*") and a separate case for Ms. Rothstein. The five California state court cases filed by Milberg Weiss were ultimately consolidated in the *Desmond* case. (App. 3).

In December 1998 competing motions for appointment as lead plaintiff and lead counsel were filed in the consolidated federal case. When it became clear that petitioners lacked the financial stake to become lead plaintiffs in the federal case, and thereby select Milberg Weiss as lead counsel, Milberg Weiss dismissed its federal case to focus on

the California cases where no financial stake rules govern the selection of lead plaintiff and lead counsel. (App. 19).

The district court certified the consolidated federal cases as a class action, certifying four separate classes on July 6, 1999. The four classes and their distinct, and conflicting, claims are described in detail in the district court's order denying in part and granting in part defendants' motion to dismiss. The gist of the claims was that each group of shareholders, the NationsBank shareholders on the one hand and the BankAmerica shareholders on the other, alleged that the other received too large a share in the merged Bank. *In re BankAmerica Corp. Securities Litigation*, 78 F. Supp.2d 976, 993-1000 (E.D. Mo. 1999).

No class has been certified in *Desmond*. Initially, Milberg Weiss sought certification of a single class, comprised of both NationsBank and BankAmerica shareholders, notwithstanding the conflict in their positions. Milberg Weiss initially proposed three individuals as class representatives, but withdrew one after the Bank discovered that he was a convicted felon with a history of fraudulent conduct. Although the class purported to include both purchasers and holders of stock, none of the proposed representatives was a purchaser. Thus, the proposed class representatives were not representative of all members of the class. The California state court denied this first class certification motion because of the irreconcilable conflicts of interest between the former NationsBank and BankAmerica shareholders. (App. 3-4, 21-22 & n.3).

Milberg Weiss filed a second class certification motion November 17, 1999. This motion broke the previously proposed class into five sub-classes modeled after the classes certified by the federal court, and proposed Milberg Weiss as counsel for three of the classes while adding a second law firm, Gold Bennett & Cera, as counsel for the other two. To remedy the lack of purchaser representatives among the plaintiffs, Milberg Weiss proposed that five persons not named as plaintiffs be appointed by the state court to represent the purchaser classes. (App. 4, 22-23).

The filing of this second class certification motion by Milberg Weiss provoked several reactions. Five days later, on November 22, 1999, the lead plaintiffs appointed by the district court moved to stay prosecution of *Desmond* as a class action. In addition, the Bank filed a notice of removal, removing *Desmond* to the United States District Court for the Northern District of California on the day the second class certification motion was scheduled to be argued and ruled on by the state court. The Bank contended removal was proper because the claims to be asserted by the proposed new class representatives were new claims for purposes of SLUSA, thus making the entire case removable. 15 U.S.C. §§ 77p(b)(c), 78bb(f)(1)-(2). (App. 4, 5, 23).

The district court judge, the Hon. Vaughn R. Walker, remanded *Desmond* to state court February 23, 2000, holding that the Bank had jumped the gun by filing its notice of removal before the state court had acted on the motion for class certification. In short, the district court held that removal was premature because the newly identified

persons had only been *proposed* as representatives but had not yet been appointed as such by the state court. (App. 4, 23). In the remand order, Judge Walker stated:

> In the event that parties or claims not stated in the original complaint are brought into this litigation by some mechanism other than amendment of the complaint, such as a class certification order, defendants would have 30 days in which to file a notice of removal under section 1446(b).

(App. 4, 23).

In response to the remand order, Reed Kathrein, a Milberg Weiss partner, wrote to the California state court judge expressing his law firm's intent to restructure the proposed classes to avoid future removal to federal court:

> Plaintiffs would like to resubmit a proposed order of class certification to this Court which would avoid adding new parties, yet resolve this Court's concerns with potential conflicts amongst the classes...

(App. 4-5, 24).

Milberg Weiss was in a difficult bind. Only five persons had been named as plaintiffs in the original state court complaints. These persons were not adequate to represent the interests of the five proposed classes so as to avoid conflicts of interests among the classes, yet Milberg Weiss could not add new persons as class representatives on peril

of removal to federal court and joinder with the multidistrict case as a tag-along subordinate to the lead plaintiffs and lead counsel appointed by the district court. Recognizing this difficulty, Milberg Weiss obtained the defendants' agreement to remove the *Desmond* class certification motion from the docket and to begin mediation to settle all class claims before class certification, notwithstanding that the state court had previously advised Milberg Weiss that irreconcilable conflicts prevented the law firm from representing all of the classes. (App. 5, 24).

Thus, shortly after Milberg Weiss filed a third motion for class certification in state court, it filed along with the defendants a joint motion requesting that the court remove the class certification motion from its calendar and that they be instead ordered to attempt immediately to mediate a settlement of the class claims. The state court granted the joint motion. (App. 5, 24).

At the time mediation was ordered, no depositions had been taken of the Bank or the other defendants or of any witnesses in either the federal or the state case, the defendants had not answered any interrogatories, and had produced only ten boxes of documents, a fraction of the many hundreds of boxes of documents subsequently produced to the lead plaintiffs in the federal case. (NationsBank Classes' Appeal Brief at 5).

If Milberg Weiss had engaged in discovery before rushing into mediation, it would have learned that the amount of the loan to the "secretive hedge fund" was $1.4 billion, and not the $372 million stated in the petition. *See Petition*

at 3. The $372 million was the amount of the *loss* the Bank announced on the loan on October 14, 1998. *BankAmerica* 78 F.Supp.2d at 983, 985. This error has been previously pointed out to petitioners. (NationsBank Classes' Appeal Brief at 8 n.7.)

On April 25, 2000, two days before the state-court sponsored mediation was to take place, the district court granted in part the lead plaintiffs' motion to enjoin the state court proceedings and issued the injunction. (App. 5, 24). Contrary to petitioners' assertion that "the injunction halted all proceedings in the California Superior Court," *Petition* at 8, the injunction has never barred petitioners from pursuing their individual claims in state court. It did, however, bar petitioners and their counsel from attempting to represent the interests of the classes in any capacity, including engaging in mediation. The injunction order also allowed petitioners to immediately opt out of the federal classes. (App. 6-7, 35-37).

Although the state court plaintiffs promptly opted out of the federal class action, Milberg Weiss has taken no steps to prosecute the state court plaintiffs' individual claims in the state court since the issuance of the injunction April 25, 2000.

Before issuing its injunction, the district court carefully considered the entire factual record before it and found:

> Milberg Weiss's behavior in these cases are precisely the sort of lawyer-driven machinations the PSLRA was designed to prevent. Hindsight now reveals that the simultaneous filing of suits in state and federal court was a blatant attempt at forum shopping. When the federal forum proved unsavory because Milberg Weiss would not be able to control that case, the firm simply took its marbles and went to play in the state court. In that forum, they have filed numerous inadequate motions for class certification, overlooking potential conflicts of interest among classes and failing to propose class representatives which truly represent the entire class. Furthermore, one proposed class representative was highly inadequate due to his criminal record and history of participation in fraud. They have attempted to circumvent the prohibitions of the SLUSA by adding non-party plaintiffs as class representatives, which would effectively create a new state securities law suit after the effective date of the SLUSA. When faced with the possibility that such an action would result in removal of the case to federal court, they indicated their intent to structure the classes, not in the best interests of the class members, but

> to avoid federal court at all costs. When that task proved difficult, they requested the state court to order mediation for settlement purposes, despite the fact that they do not represent the class and despite the fact that minimal discovery has been done either on the substantive issues or the damages available to class members. Clearly, the *Desmond* case is nothing more than a thinly-veiled attempt to circumvent federal law. The *Desmond* plaintiffs, and the law firm behind them, do not have the best interests of the class at heart and have proven themselves wholly inadequate to control the conduct of this suit. The Court finds their attempts to do so outrageous. Accordingly, under the facts of this case, the Court finds that an injunction is necessary to preserve the federal plaintiffs' rights under the PSLRA.

(App. 29-30).

As noted previously, petitioners in their briefs before the Eighth Circuit never challenged the district court's factual findings.

REASONS FOR DENYING THE PETITION

The decision below is the only decision by any Court of Appeals considering whether the lead plaintiff provisions of the PSLRA qualify as an "expressly authorized" exception to the Anti-Injunction Act. No other reported decision in any other case has ever even considered the issue at either the trial or appellate level. Thus, the decision of the Court of Appeals for the Eighth Circuit does not conflict with the decision of another Court of Appeals.

Not surprisingly, no state court of last resort has ruled on this issue, and the decision of the Court of Appeals for the Eighth Circuit does not conflict with the decision of any state court of last resort.

Thus, while petitioners contend that the Court should grant certiorari because of an asserted conflict among the circuits, there is no conflict.

Furthermore, even if there were some conflict among the circuits, this case is not a suitable vehicle to address such conflict. The injunction was issued under a statutory framework which no longer exists. At the time petitioners' state law suits were filed, securities law class actions were governed by the PSLRA. Within days of those suits being filed, however, the SLUSA came into effect, essentially eliminating the filing of securities class actions in state court. The particular constellation of statutes which gave rise to this case has sunk below the horizon. Thus a decision by this Court would affect, at most, the parties to this case and no other.

But, a decision by this Court will not even affect the parties to this case. The federal class actions have been settled, subject to final court approval. The defendants will pay the class members $490 million. Even if this Court were to hold that the legal basis for the injunction issued by the district court, and affirmed by the Court of Appeals, was in error, the injunction could nonetheless be sustained on the uncontroversial grounds of protecting the settlement. *See, e.g., In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328, 337-38 (2nd Cir. 1985) (district court had power to enjoin state court actions against federal defendants to protect those defendants from state court harassment, even though several states were plaintiffs in the court actions, where there was a "substantially significant prospect that these ... defendants will settle in the reasonably near future").

Accordingly, however the Court resolves the petition, the result will be that petitioners will have the same right they have under the terms of the current injunction: the right to prosecute their individual, opt-out claims in California state court as they see fit.

CONCLUSION

This case, which uniquely presents an issue which is of both first and last impression, does not merit consideration by the Court. The petition for certiorari should be denied.

Respectfully submitted,

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(3)

No. 01-1084

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In The

Supreme Court of the United States

ALLISON DESMOND, et al., On Behalf of Themselves and All Others Similarly Situated,

Petitioners,

vs.

BANKAMERICA CORPORATION, JOSEPH HEMPEN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

Page

CASES

Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs,
398 U.S. 281 (1970) 3

Chick Kam Choo v. Exxon Corp.,
486 U.S. 140 (1988) 3

Devlin v. Scardelletti,
122 S. Ct. 663 (2001) 2

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation,
484 U.S. 49 (1987) 1

In re Microsoft Corp. Antitrust Litig., MDL 1332,
2002 U.S. Dist. LEXIS 728 (D. Md. Jan. 11, 2002) 2

Matsushita Electrical Industrial Co. v. Epstein,
516 U.S. 367 (1996) 3

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 2

Vendo Co. v. Lektro-Vend Corp.,
433 U.S. 623 (1977) 1

STATUTES, RULES AND REGULATIONS

15 U.S.C.
§77p(b)-(c) 3

§78bb(f)(1)-(2) 3

28 U.S.C.
§2283 ..... 1, 4

Federal Rules of Civil Procedure
23 2

Respondents' opposition to the petition is long on irrelevant procedural background and taking potshots at petitioners' counsel, but short on confronting the important issues petitioners identify that merit certiorari. The Anti-Injunction Act, 28 U.S.C. §2283, is scarcely mentioned by respondents. They make no effort to defend the federal anti-suit injunction that shut the door to all practical relief for a class of defrauded BankAmerica shareholders in the California state courts.

Respondents' avoidance is understandable. As the petition explained, the injunction halting the *Desmond* state action cannot be sustained under any conceivable test for applying the Anti-Injunction Act's "expressly authorized" exception. Of particular interest to this Court, the decision below compounds a circuit split on the proper test to apply. The confusion in the circuits stems ultimately from the divided decision in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977). Although *Vendo* was the last time this Court addressed the "expressly authorized" exception, the decision failed to produce a majority opinion and left the law unclear. *See* Petition 13-25. The need to end the uncertainty *Vendo* has generated is a matter of vital importance to the federal courts and is not eliminated by pretending it does not exist.

Respondents' subsidiary justifications for denying certiorari lack merit. A party claiming mootness carries a "heavy" burden. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 66 (1987). Respondents have shown nothing more than the possibility of a settlement of the federal case.

As respondents recognize, any class-action settlement must be approved by the district court after giving class members the opportunity to opt out and to object. *See* Fed. R. Civ. P. 23; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Judicial approval is hardly a foregone conclusion and parties often are sent back to the drawing board if the proposed settlement is found to be inadequate. *See, e.g., In re Microsoft Corp. Antitrust Litig.*, MDL 1332, 2002 U.S. Dist. LEXIS 728 (D. Md. Jan. 11, 2002). Indeed, although respondents claim the apparent settlement is valued at $490 million, this is considerably less than the billions of dollars in estimated damages that, but for being wrongly enjoined, might have been recovered for the same shareholders in the *Desmond* California state suit. 8th Cir. App. 141-71.

Additional litigation is especially likely if the settlement is tied up by collateral attacks. Appeals of class-action settlements are common. This Court granted certiorari this Term to address whether unnamed class members must intervene in the district court to gain standing to appeal a settlement. *Devlin v. Scardelletti*, 122 S. Ct. 663 (2001). In light of the district court's aggressive approach to enjoining the *Desmond* action – to the point of barring any mediation efforts in the state case – that court may see fit to halt the *Desmond* proceedings during any federal appeal. In short, respondents have shown only that the injunction may be extinguished if certain conditions precedent are satisfied. This conjecture is little comfort to the *Desmond* plaintiffs, who have been barred from pursuing their state claims, and a potentially more favorable result, for nearly two years. With good reason, mere speculation of mootness (all litigation must end at some point) is no

basis for denying an aggrieved party the redress of the courts or the state forum of their choice.

Respondents alternatively contend that the petition should be denied because the state suit, a securities class action in the California courts, would now be barred by the Securities Litigation Uniform Standards Act, making a federal anti-suit injunction of a state securities class action unlikely to recur. *See* 15 U.S.C. §§77p(b)-(c), 78bb(f)(1)-(2). But the logic of the decision below is not so restricted. By disregarding *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996) – which holds that state courts must be given deference whenever "dual litigation" is "contemplated" – the Eighth Circuit's analysis significantly impacts numerous other areas of litigation in which state and federal courts have dual jurisdiction. *Id.* at 383. These areas include antitrust, civil rights, and employment actions. *See* Petition at 15, 26. Hence this case is far from *sui generis*.

Because the Private Securities Litigation Reform Act does not, even remotely, no matter how its language is stretched, allow a federal court to enjoin a state proceeding, respondents suggest an injunction is justified to police purported lawyer misconduct in state court. That notion – dubious on its face and supported by no authority – falters for the simple reason that state judges, on this subject and any other potentially affecting a federal right or interest, are to be trusted to address the objection in the state forum. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988). Review is through the state courts and, if necessary, certiorari review by this Court. *Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970). The blunderbuss of a federal anti-suit injunction

flouts the respect that must be accorded to state courts and basic principles of federalism that have driven the Anti-Injunction Act for over 200 years.

Finally, respondents are incorrect that petitioners somehow acquiesced in the so-called "factual findings" supporting the injunction. On the contrary, petitioners argued that their counsel did nothing improper by electing the state forum because, among other things, it held the prospect of recovering substantially greater damages for the class. Appellants' Opening Bf. 4-14; Reply Bf. 3-6. Again, the propriety of this choice was confirmed by the California state judge who witnessed the events in *Desmond*. *See* Petition at 8. In any event, respondents' effort to salvage the injunction based on "factual findings" is barren. It makes no difference that a federal anti-suit injunction may be "expressly authorized" by "factual findings" if it is not "expressly authorized" by "Act of Congress." 28 U.S.C. §2283.

For the unrebutted reasons stated in the petition, this Court should grant certiorari to clarify the law governing the "expressly authorized" exception.

DATED: March 8, 2002

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